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May 24, 2023

BY HAND

The Honorable Teresa T. Carroll
Clerk of Court
County of Orange Circuit Court
110 North Madison Road, Suite 300
Orange, VA 22960-0133

RE: *American Battlefield Trust, Friends of Wilderness Battlefields, Inc., Central Virginia Battlefields Trust, Inc., Mark W. and Cheryl M. Nowacki, Robert J. Foster, Individually and as Trustee of the Robert J. and Joanne S. Foster Living Trust v. Board of Supervisors for Orange County, Virginia and Orange County, Virginia*

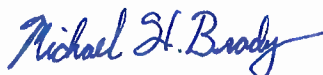
Dear Clerk Carroll:

Enclosed please find for immediate filing one (1) original copy of the Petition for Review and Complaint for Declaratory, Mandamus, Injunctive & Other Relief (the "Petition"), with referenced exhibits, commencing a new matter. Please also find enclosed with the Petition a Civil Cover Sheet and a check for \$84.00, covering the filing fees your office indicated were necessary for this type of civil action. Service will be made by a private process server.

I have included three (3) additional copies of the Petition, one with an additional copy of the exhibits. Please prepare a summons to accompany the copy of the Petition with the exhibits, and another to accompany a second copy, without exhibits for the second named defendant. Both copies will be served on the same recipient, who is the statutory agent for service of process for both of the named defendants. Please date stamp and return to me the third copy of the Petition, without exhibits, in the enclosed, postage prepaid, envelope.

Once the summonses is issued and the service copy is ready, please advise me at the information listed above. If you have any questions, please do not hesitate to contact me at the information listed above, where I am,

Very truly yours,



Michael H. Brady

MHB/clh
Enclosures



OFFICIAL RECEIPT
ORANGE CIRCUIT COURT
CIVIL

DATE : 05/24/2023 TIME : 16:30:10 CASE # : 137CL2300062200
RECEIPT # : 23000004441 TRANSACTION # : 23052400031 FILING TYPE : WM PAYMENT : FULL PAYMENT
CASHIER : DLC REGISTER # : G022

CASE COMMENTS : AMERICAN BATTLEFIELD TRU v. BOARD OF SUPERVISORS
SUIT AMOUNT : \$0.00

ACCOUNT OF : AMERICAN BATTLEFIELD TRUST

PAID BY : WHITEFORD, TAYLOR & PRESTON

CHECK : \$84.00 CHECK NUMBER : 170804

DESCRIPTION 1 : WM:WRIT OF MANDAMUS

2 : PLAINTIFF: AMERICAN BATTLEFIELD TRUST

3 : NO HEARING SCHEDULED

ACCOUNT CODE	DESCRIPTION	PAID
049	WRIT TAX (CIVIL)	\$5.00
106	TECHNOLOGY TRST FND	\$5.00
123	LEGAL AID SERVICES	\$9.00
147	INDIGENT ASSISTANCE (INA)	\$1.00

ACCOUNT CODE	DESCRIPTION	PAID
170	COURT TECHNOLOGY FUND	\$10.00
219	LAW LIBRARY	\$4.00
304	CIVIL FILING FEE (LAW & EQUITY)	\$50.00

TENDERED : \$ 84.00
AMOUNT PAID : \$ 84.00

COVER SHEET FOR FILING CIVIL ACTIONS
COMMONWEALTH OF VIRGINIA

Case No. CL 23000622-00
(CLERK'S OFFICE USE ONLY)

County of Orange

Circuit Court

See attached listing

v./In re: Board of Supervisors for Orange County, Virginia

PLAINTIFF(S)

DEFENDANT(S)

c/o Michael H. Brady, Esq., Whiteford, Taylor & Preston L.L.P.

Orange County, Virginia

I, the undersigned plaintiff defendant attorney for plaintiff defendant hereby notify the Clerk of Court that I am filing the following civil action. (Please indicate by checking box that most closely identifies the claim being asserted or relief sought.)

GENERAL CIVIL

Subsequent Actions

- Claim Impleading Third Party Defendant
 - Monetary Damages
 - No Monetary Damages
- Counterclaim
 - Monetary Damages
 - No Monetary Damages
- Cross Claim
- Interpleader
- Reinstatement (other than divorce or driving privileges)
- Removal of Case to Federal Court

Business & Contract

- Attachment
- Confessed Judgment
- Contract Action
- Contract Specific Performance
- Detinue
- Garnishment

Property

- Annexation
- Condemnation
- Ejectment
- Encumber/Sell Real Estate
- Enforce Vendor's Lien
- Escheatment
- Establish Boundaries
- Landlord/Tenant
 - Unlawful Detainer
- Mechanics Lien
- Partition
- Quiet Title
- Termination of Mineral Rights

Tort

- Asbestos Litigation
- Compromise Settlement
- Intentional Tort
- Medical Malpractice
- Motor Vehicle Tort
- Product Liability
- Wrongful Death
- Other General Tort Liability

ADMINISTRATIVE LAW

- Appeal/Judicial Review of Decision of (select one)
 - ABC Board
 - Board of Zoning
 - Compensation Board
 - DMV License Suspension
 - Employee Grievance Decision
 - Employment Commission
 - Local Government
 - Marine Resources Commission
 - School Board
 - Voter Registration
 - Other Administrative Appeal

DOMESTIC/FAMILY

- Adoption
 - Adoption - Foreign
- Adult Protection
- Annulment
 - Annulment - Counterclaim/Responsive Pleading
- Child Abuse and Neglect - Unfounded Complaint
- Civil Contempt
- Divorce (select one)
 - Complaint - Contested*
 - Complaint - Uncontested*
 - Counterclaim/Responsive Pleading
 - Reinstatement - Custody/Visitation/Support/Equitable Distribution
- Separate Maintenance
 - Separate Maintenance Counterclaim

WRITS

- Certiorari
- Habeas Corpus
- Mandamus
- Prohibition
- Quo Warranto

PROBATE/WILLS AND TRUSTS

- Accounting
- Aid and Guidance
- Appointment (select one)
 - Guardian/Conservator
 - Standby Guardian/Conservator
 - Custodian/Successor Custodian (UTMA)
- Trust (select one)
 - Impress/Declare/Create
 - Reformation
- Will (select one)
 - Construe
 - Contested

MISCELLANEOUS

- Amend Birth/Death Certificate
- Appointment (select one)
 - Church Trustee
 - Conservator of Peace
 - Marriage Celebrant
- Approval of Transfer of Structured Settlement
- Bond Forfeiture Appeal
- Declaratory Judgment
- Declare Death
- Driving Privileges (select one)
 - Reinstatement pursuant to § 46.2-427
 - Restoration - Habitual Offender or 3rd Offense
- Expungement
- Firearms Rights - Restoration
- Forfeiture of Property or Money
- Freedom of Information
- Injunction
- Interdiction
- Interrogatory
- Judgment Lien-Bill to Enforce
- Law Enforcement/Public Official Petition
- Name Change
- Referendum Elections
- Sever Order
- Taxes (select one)
 - Correct Erroneous State/Local
 - Delinquent
- Vehicle Confiscation
- Voting Rights - Restoration
- Other (please specify)



Damages in the amount of \$ 0.00 are claimed.

5/24/2023

DATE

Michael H. Brady

PLAINTIFF DEFENDANT ATTORNEY FOR PLAINTIFF DEFENDANT

Michael Hugh Brady, Esq.

PRINT NAME

Whiteford, Taylor & Preston L.L.P.

ADDRESS/TELEPHONE NUMBER OF SIGNATOR

1021 East Cary Street, Suite 1700, Richmond, VA 23219

mbrady@whitefordlaw.com

EMAIL ADDRESS OF SIGNATOR (OPTIONAL)

*"Contested" divorce means any of the following matters are in dispute: grounds of divorce, spousal support and maintenance, child custody and/or visitation, child support, property distribution or debt allocation. An "Uncontested" divorce is filed on no fault grounds and none of the above issues are in dispute.

List of Plaintiffs-Petitioners

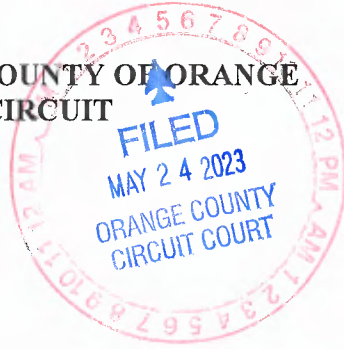
- American Battlefield Trust
- Friends of Wilderness Battlefield, Inc.
- Central Virginia Battlefields Trust, Inc.
- Mark W. and Cheryl M. Nowacki
- Robert J. Foster, Individually and as Trustee of the Robert J. and Joanne S. Foster Living Trust

**Civil Action Type Codes
(Clerk's Office Use Only)**

Accounting	ACCT	Ejectment	EJET
Adoption	ADOP	Encumber/Sell Real Estate	RE
Adoption – Foreign	FORA	Enforce Vendor's Lien	VEND
Adult Protection	PROT	Escheatment	ESC
Aid and Guidance	AID	Establish Boundaries	ESTB
Amend Birth/Death Certificate	AVR	Expungement	XPUN
Annexation	ANEX	Forfeiture of Property or Money	FORF
Annulment	ANUL	Freedom of Information	FOI
Annulment – Counterclaim/Responsive Pleading	ACRP	Garnishment	GARN
Appeal/Judicial Review		Injunction	INJ
ABC Board	ABC	Intentional Tort	ITOR
Board of Zoning	ZONE	Interdiction	INTD
Compensation Board	ACOM	Interpleader	INTP
DMV License Suspension	JR	Interrogatory	INTR
Employment Commission	EMP	Judgment Lien – Bill to Enforce	LIEN
Employment Grievance Decision	GRV	Landlord/Tenant	LT
Local Government	GOVT	Law Enforcement/Public Official Petition	LEP
Marine Resources	MAR	Mechanics Lien	MECH
School Board	JR	Medical Malpractice	MED
Voter Registration	AVOT	Motor Vehicle Tort	MV
Other Administrative Appeal	AAPL	Name Change	NC
Appointment		Other General Tort Liability	GTOR
Conservator of Peace	COP	Partition	PART
Church Trustee	AOCT	Permit, Unconstitutional Grant/Denial by Locality	LUC
Custodian/Successor Custodian (UTMA)	UTMA	Petition – (Miscellaneous)	PET
Guardian/Conservator	APPT	Product Liability	PROD
Marriage Celebrant	ROMC	Quiet Title	QT
Standby Guardian/Conservator	STND	Referendum Elections	ELEC
Approval of Transfer of Structured Settlement	SS	Reinstatement (Other than divorce or driving privileges)	REIN
Asbestos Litigation	AL	Removal of Case to Federal Court	REM
Attachment	ATT	Restore Firearms Rights – Felony	RFRF
Bond Forfeiture Appeal	BFA	Restore Firearms Rights – Review	RFRR
Child Abuse and Neglect – Unfounded Complaint	CAN	Separate Maintenance	SEP
Civil Contempt	CCON	Separate Maintenance – Counterclaim/Responsive Pleading	SCRP
Claim Impleading Third Party Defendant – Monetary Damages/No Monetary Damages	CTP	Sever Order	SEVR
Complaint – (Miscellaneous)	COM	Sex Change	COS
Compromise Settlement	COMP	Taxes	
Condemnation	COND	Correct Erroneous State/Local	CTAX
Confessed Judgment	CJ	Delinquent	DTAX
Contract Action	CNTR	Termination of Mineral Rights	MIN
Contract Specific Performance	PERF	Trust – Impress/Declare/Create	TRST
Counterclaim – Monetary Damages/No Monetary Damages	CC	Trust – Reformation	REFT
Cross Claim	CROS	Uniform Foreign Country Money Judgments	RFCJ
Declaratory Judgment	DECL	Unlawful Detainer	UD
Declare Death	DDTH	Vehicle Confiscation	VEH
Detinue	DET	Violation – Election Law	VEL
Divorce		Voting Rights – Restoration	VOTE
Complaint – Contested/Uncontested	DIV	Will Construction	CNST
Counterclaim/Responsive Pleading	DCRP	Will Contested	WILL
Reinstatement – Custody/Visitation/Support/ Equitable Distribution	CVS	Writs	
Driving Privileges		Certiorari	WC
Reinstatement pursuant to § 46.2-427	DRIV	Habeas Corpus	WHC
Restoration – 3 rd Offense	REST	Mandamus	WM
		Prohibition	WP
		Quo Warranto	WQW
		Wrongful Death	WD

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ORANGE
SIXTEENTH JUDICIAL CIRCUIT



AMERICAN BATTLEFIELD TRUST,
et al.

Plaintiffs-Petitioners et al.,

v.

THE BOARD OF SUPERVISORS FOR
ORANGE COUNTY, VIRGINIA,

and

ORANGE COUNTY, VIRGINIA,

Defendants-Respondents.

Case No. CL CL23000 622-00

AFFIDAVIT OF J. BRYAN NICOL

COMES NOW, Affiant J. Bryan Nicol, and doth hereby solemnly swear as follows:

1. I am an adult over eighteen years of age and otherwise competent to testify.
2. I am a resident of Orange County, Virginia, and a member of the Planning Commission of Orange County, Virginia.
3. I have personal knowledge of and am fully familiar with the facts set forth herein.
4. I submit this affidavit in accordance with the procedures set forth in Virginia Code § 2.2-3713(A) for actions concerning the Virginia Freedom of Information Act (“VFOIA”).
5. As more fully described in the Petition to which this Affidavit is attached, a meeting of the Economic Development Partners Group, an informal gathering of Orange County leaders interested in development in the Germanna-Wilderness Area of Orange County, was held on April 13, 2023.

6. An email about this meeting was sent by Supervisor Lee Frame on April 10, 2023 to a number of community leaders, including the County Administrator for Orange County, three other members of the Board of Supervisors of Orange County, other County staff and a host of other persons, including myself.

7. An agenda for the April 13, 2023 meeting was provided with that email.

8. A true and correct copy of that email and the agenda attached thereto is an exhibit to the Petition in the above-referenced matter.

9. The day prior to the April 13, 2023 meeting, the legal advertisement of the forthcoming public hearing on the application and proposed rezoning, REZ 22-03, had been published

10. I personally attended the April 13, 2023 meeting, as did Supervisors Lee Frame, Jim Crozier, Jim White and Keith Marshall, along with a number of other persons.

11. Supervisor R. Mark Johnson was the only Supervisor who did not attend.

12. During the meeting, each of the Supervisors present discussed the application and proposed rezoning, REZ 22-03, aspects of the Board's consideration of the same, and other matters affecting that rezoning.

13. Each of the Supervisors present also specifically referenced and discussed the fact that the Board had advertised and would be holding its public hearing on the application and proposed rezoning on Tuesday, April 25, 2023 at 6 p.m. in the Orange County Public Safety Building.

14. During the meeting on April 13, 2023, Supervisor Crozier, District Supervisor for the area that is the subject of the application and proposed rezoning, admitted to having signed a non-disclosure agreement.

15. At that meeting, I questioned each of the other Supervisors about whether they had signed a non-disclosure agreement in connection with the application and proposed rezoning, REZ 22-03. The other three Supervisors responded “no comment” to me in answer to my question about signing a non-disclosure agreement.

16. Prior to this April 13, 2023 meeting and in the course of our Planning Commission work sessions and in advance of the Planning Commission public hearing on the application, the Planning Commission requested of the County Supervisors and the County Staff confidential access to a copy of the non-disclosure agreement(s) and other information about the parties and nature of the agreement(s) as it pertains to the area covered by the application and proposed rezoning.

17. No agreement(s) have been provided to me or to the Planning Commission and no other information pertaining to these agreement(s) has been disclosed to me or to the Planning Commission.

18. I am aware that other citizens of the Commonwealth of Virginia have requested, through VFOIA, copies of the non-disclosure agreement(s) and been refused such copies, as well as other information requested, in reliance upon such non-disclosure agreement(s).

19. I have inquired and am aware of no public or legal notice having been given of that meeting of April 13, 2023.

20. I have inquired and am aware of no public or legal advertisement having been posted for that meeting of April 13, 2023.

21. I have inquired and am aware of no agenda or agenda packets having been made available for public inspection relating to that meeting of April 13, 2023.

22. I have inquired and am aware of no minutes having been made of that meeting of April 13, 2023.

Pursuant to Virginia Code §§ 2.2-3713 and 8.01-280, I hereby declare under penalty of perjury under the laws of the United States of America that I believe the foregoing averments to be true and correct to the best of my knowledge, information, and belief.

FURTHER AFFIANT SAYETH NOT.

Executed on May 24, 2023

Dallas County, Texas

J. Bryan Nicol

J. Bryan Nicol

STATE OF TEXAS)

COUNTY OF DALLAS)

to-wit:

BEFORE ME, Casey Paul, a Notary Public in and for the foregoing jurisdiction, on this the 24th day of May, 2023, personally appeared J. Bryan Nicol, proved to me by a copy of his driver's license issued by the Commonwealth of Virginia to be the person whose name is subscribed to the foregoing Affidavit and acknowledged to and swore before me that he believes the foregoing averments to be true and correct to the best of his knowledge, information, and belief and that he executed the foregoing Affidavit for the purposes and consideration therein expressed.

Given under my hand and official seal this 24th day of May, 2023.

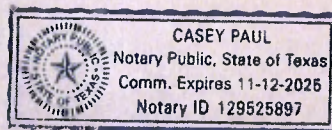
[NOTARY SEAL]

Casey Paul

Notary Public in and for the State of Texas

My commission expires: 11-12-2025

Notary registration number: 129525897



VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ORANGE
SIXTEENTH JUDICIAL CIRCUIT

AMERICAN BATTLEFIELD TRUST,
FRIENDS OF WILDERNESS BATTLEFIELD,
INC., CENTRAL VIRGINIA BATTLEFIELDS
TRUST, INC., MARK W. AND CHERYL M.
NOWACKI, ROBERT J. FOSTER,
INDIVIDUALLY AND AS TRUSTEE OF THE
ROBERT J. AND JOANNE S. FOSTER
LIVING TRUST,

Plaintiffs-Petitioners,

v.

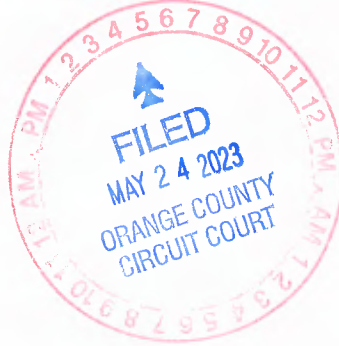
BOARD OF SUPERVISORS FOR
ORANGE COUNTY, VIRGINIA,

and

ORANGE COUNTY, VIRGINIA,
Gordon Building
112 West Main Street
Orange, VA 22960

Serve: Thomas E. Lacheney
County Attorney
Gordon Building
112 West Main Street
Orange, VA 22960

Defendants-Respondents.



Case No. CL 23 000622-01

**PETITION FOR REVIEW AND
COMPLAINT FOR DECLARATORY, MANDAMUS, INJUNCTIVE & OTHER RELIEF**

COME NOW the above-named Plaintiffs-Petitioners (the "Citizens"), by their counsel,
and hereby file this Petition for Review and Complaint for Declaratory, Mandamus, Injunctive &
Other Relief (the "Petition"), appealing, *inter alia*, the April 25, 2023 decision of the Board of

Supervisors of Orange County, Virginia (the “**Board**”) to grant an application to rezone more than 2,500 acres of land in the Germanna-Wilderness Area of the County from Agricultural (A), General Commercial (C-2), Limited Residential (R-1) Conditional, and General Industrial (I-2) Conditional to Planned Development – Mixed Use (Conditional), REZ 22-03 (the “**Wilderness Crossing Application**”). A copy of the Wilderness Crossing Application dated June 8, 2022 is attached as **Exhibit 1**.

In granting the Wilderness Crossing Application, the Board gave a blank check to undisclosed interests to intensely develop, over several decades, hundreds of acres of forested, undeveloped land adjacent to the Wilderness Battlefield, the location of a key Civil War engagement in 1864, for industrial, commercial and residential uses (the “**Rezoning**”). A certified copy of Ordinance Number 230425 – PH3, purporting to approve the Wilderness Crossing Application and proposed Rezoning (the “**Rezoning Ordinance**”), including the attached “**Legal Summary**” and “**Voluntary Proffer Statement**,” Schedule 1 (“**List of Owners**”), Schedule 2 (“**List of Properties**”), Exhibit A (“**Generalized Development Plan**” or “**GDP**”), Exhibit B (“**Design Guidelines Manual**”), Exhibit C (“**Land Use Chart**”), Exhibit D (“**Transportation Impact Analysis**” or “**TIA**”) and Exhibit E (“**Church Buffer Exhibit**”), are attached in their entirety to the Petition as **Exhibit 2**.

This challenge to the Rezoning is brought pursuant to Sections 2.2-3713, 8.01-184, 8.01-620, 8.01-645, 15.2-2204(E), and 15.2-2285(F) of the Code of Virginia (the “**Code**”) and under the Code of Ordinances, County of Orange, Virginia (“**Orange County Code**”), more particularly under Sections 70-91 and 70-197 of Chapter 70 of the Orange County Code with regard to zoning matters (the “**Zoning Ordinance**”).

INTRODUCTION

1. The Rezoning is the largest rezoning in the County's history. The twenty (20) parcels subject to the Rezoning total 2,618.47 acres \pm and lie just north of Germanna Highway (Route 3), to the north and west of where Route 3 and Route 20 (Constitution Highway) intersect with Plank Road (the "**Wilderness Crossing Land**").¹

2. The Wilderness Crossing Land directly abuts core areas of the Wilderness Battlefield.

3. "Core areas" of the Wilderness Battlefield are identified by historians and surveyors with the United States National Park Service ("**NPS**") and represent the main area of fighting on the battlefield. Positions that delivered or received intense fire are classed within the "core area." Conversely, "study areas" represent the geographical extent to which historic and archeological resources associated with the battle (areas of combat, command, communications, logistics, medical services, etc.) may be found and protected. The study area contains resources known to relate to, or contribute to, battle events: avenues of approach and where troops maneuvered, deployed, and fought immediately before, during, and after combat. Historic accounts, terrain analysis, and geographic feature identification inform the delineation of the study area.

4. In addition to adjoining "core areas" of the Wilderness Battlefield, and therefore being vital to the viewshed of those areas, 411 acres \pm of the Wilderness Crossing Land to be developed, mostly that portion abutting Germanna Highway (Route 3), are themselves "study areas" for the Wilderness Battlefield.

¹ The GDP puts the acreage rezoned at 2,589.182, substantially less than that stated in the Rezoning Ordinance. GDP at 1 (Owner Area Summary).

5. On the 411 acres ±, more than 160,000 Union and Confederate soldiers under the commands of Lieutenant General Ulysses S. Grant, U.S.A (Commander-in-Chief of the Union Armies) and General Robert E. Lee, C.S.A. (Army of Northern Virginia), respectively, fought bitterly in early May 1864.²

6. These armies collectively sustained nearly 30,000 casualties over May 5 through 7 in the Battle of the Wilderness, as the battle became known. Although a tactical defeat for the Union's Army of the Potomac, the battle proved to be the beginning of a sustained, 11-month offensive by General Grant that would culminate in the fall of the City of Petersburg, the capture of Richmond, Lee's surrender at Appomattox Courthouse in April 1865, and the reunification of our Nation.

7. Today, portions of the historic Wilderness Battlefield are part of the larger Fredericksburg-Spotsylvania National Military Park (the "**National Military Park**"), a Congressionally created conservation area embracing parts of four battlefields—those of Fredericksburg, Chancellorsville, Spotsylvania and the Wilderness—all owned and managed by the NPS. The portions of the historic site of the Wilderness Battlefield within the National Military Park are depicted via an aerial map maintained by the NPS at: <https://www.nps.gov/frsp/learn/historyculture/wilderness-battlefield.htm>. The National Military Park is shown here:

² The Wilderness Battlefield was studied by the Civil War Sites Advisory Commission, established under the "Civil War Sites Study Act of 1990," Pub. L. No. 101-628, Title XII Sections 1201-1210, 104 Stat. 4469, 4503-07 (Nov. 28, 1990), in a publication known as the "The Report on the Nation's Civil War Battlefields" or the "CWSAC Report." A copy of that report, addressing the importance and preservation priority of the Wilderness Battlefield on page 9, is available here, <http://npshistory.com/publications/battlefield/cwsac/report.pdf>, and exhibited below. The CWSAC Report was supplemented by subsequent NPS reports in 1998 and 2009.



8. Directly abutting and enveloping portions of the historic site of the Wilderness Battlefield and Chancellorsville Battlefield, the Wilderness Crossing Land is just across Route 3, mere feet, from the National Military Park's NPS-established boundaries for the Wilderness Battlefield. This is illustrated more clearly in a map attached as **Exhibit 3**.

9. Moreover, the roads used to reach portions of both the historic site of the Wilderness Battlefield, the Chancellorsville Battlefield, including those portions within the National Military Park—the Plank Road, State Route 3 and State Route 20—also are the only public roads enabling vehicular access to the Wilderness Crossing Land.

10. The Rezoning is projected by the Developer itself (even without considering the last-minute expansion of the Project) to add more than 60,000 vehicle trips per day at full buildout to the traffic burdening these roadways and the adjoining lands and landowners with noise, dust and odor.

11. The Rezoning granted the Board's approval to develop the Wilderness Crossing Land, referred to commonly and herein as the "**Wilderness Crossing Project**," comprising nearly all of the Wilderness Run Subarea in the Germanna-Wilderness Area of the County.

12. A copy of the Germanna-Wilderness Area Plan, which was adopted on July 14, 2015 as part of the County's Comprehensive Plan and depicts the aforementioned Wilderness Run Subarea and the larger Germanna-Wilderness Area, may be found at <https://orangecountyva.gov/DocumentCenter/View/1443> (the "**GWAP**").

13. The Wilderness Crossing Project would result in the construction of up to 5,000 residences, as much as 750+ acres of industrial development, and hundreds of acres of commercial development. These residential, commercial and industrial uses would involve the erection of structures dwarfing the natural scene, some rising 80 or more feet in the air, and would be built in four phases across 40 years, all on largely unimproved land within, adjacent to, or overlooking the Wilderness and/or Chancellorsville Battlefields.

14. As noted above, this mammoth development, sited on land crisscrossed by streams and pocked by inactive gold mines³, would occur over the course of several decades, add over 60,000 vehicle trips per day to the roads serving those historic sites, and further tax an already overdrawn public infrastructure, including water, wastewater, and electricity.

15. Despite the lengthy buildout projected and the extraordinary changes it portends for the Germanna-Wilderness Area, the Rezoning was approved on the run.

16. The Rezoning was granted on the back of a fatally deficient rezoning application, without adequate consideration of the effect on neighboring lands, localities, or the roads that unite them, without proper procedure, and over nigh unanimous opposition.

³ See GDP (Sheets 4 and 5).

17. No analysis of impacts on historic and cultural resources was conducted or submitted to the Commission or the Board.

18. No analysis of impacts to the environment, including through impoundment of streams such as Wilderness Run and disturbance of abandoned gold mines, were submitted. This failing is shocking, given prior findings that the Wilderness Crossing Land was the site of 15 known, unreclaimed gold mining sites that contain substantial contaminants, such as mercury, arsenic, cadmium and lead.

19. The evaluation of impacts on vital public services, including water, sewer and electricity, also went unaddressed, even though it is generally known that the Rapidan Service Authority has limited capacity to meet existing demand for water and wastewater services in the Germanna-Wilderness Area, much less the dramatically increased demand contemplated by the Wilderness Crossing Project.

20. While some site planning was submitted, the required detail, about proposed structures and water utilities, grading, parking, landscaping and subdivision, are almost wholly lacking. Even the Wilderness Crossing Application does not purport to address “[p]roposed utilities.” *See* Ex. 1.

21. Various improper “conditions” were granted in the Rezoning, including relief from the common burden of real estate assessment, in violation of the Virginia Constitution’s uniformity command and the general assessment statutes adopted by the General Assembly, and an additional 35 feet of height allow to certain buildings (and an unlimited height for others), in contravention of the Orange County Code.

22. The Rezoning’s approval of “industrial uses” via a zoning map amendment to be included within the Planned Development – Mixed Use district violates the Orange County Code.

23. Additionally, in the Board's rush to jam the uniformly unpopular Rezoning through, material changes were made to the conditions proffered to the Commission and previously submitted to the Board on the day of the public hearing.

24. These last-minute material changes include, but are not limited to: millions more in cash proffers (from \$6,000,000.00 to as much as \$24,000,000.00), increase of the permitted square footage "of industrial data center and warehouse/distribution building space" (from 5,000,000 to over 30,000,000), and the elimination of various project amenities.

25. Some materials created by representatives advancing the Wilderness Crossing Application and provided to certain members of the Board in an effort to persuade them to grant the Rezoning were concealed from Planning Commission and public scrutiny, despite Virginia Freedom of Information Act requests by parties seeking to participate in the public hearing and comment process required by the Code.

26. The County's refusal to produce the requested public records was premised upon non-disclosure agreements between Board members and unnamed interests, the parties to and terms of which were also concealed (collectively, the "**VFOIA Refusals**").

27. The VFOIA Refusals specifically, and the lack of disclosures and submittals generally, constituted, not only a violation of Virginia and local rezoning laws, but also a flagrant disregard of the letter and spirit of the Virginia Freedom Information Act, which instructs that "[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since *at all times the public is to be the beneficiary of any action taken at any level of government.*" Va. Code § 2.2-3700(B) (emphasis added).

28. The Petition challenges the Rezoning to prevent flagrant abuses of the zoning process, to prevent the sale of the general welfare of residents of the Germanna-Wilderness Area

and the destruction of their quiet use and enjoyment of their homes and lands for tax dollars and cash proffers, and to preserve the important historical and cultural resources of the Wilderness and Chancellorsville Battlefields for the use and enjoyment of generations to come.

29. Toward that end, the Petition seeks declaratory, mandamus and injunctive relief, recovery of all reasonable costs incurred in this cause, recovery of reasonable fees and costs incurred in seeking to vindicate the open meeting requirements of the Virginia Freedom of Information Act, and such other and further appropriate relief from this arbitrary, capricious, unreasonable, unlawful, improper, and void *ab initio* legislative action taken by the Board to the detriment of the citizens of the County, the Commonwealth, and the Country, many of whom visit the area from all over the United States to tread these hallowed grounds.

30. In further support of the Petition and of the relief prayed for, the Citizens state the following:

PARTIES & PROPERTY

31. The County of Orange is a body politic and corporate and political subdivision of the Commonwealth of Virginia dated to 1735 (the “**County**”).

32. The County was formed from the western part of Spotsylvania County by an Act of the legislative power of the Royal Colony of Virginia passed in August of 1734. IV WILLIAM WALLER HENING, STATUTES AT LARGE 450 (1820) (Chapter XXIV of 1734).

33. The County was so named in honor of Prince William IV and Princess Anne, of the Dutch Royal House of Orange-Nassau, Princess Anne being the eldest daughter of King George II, who was then reigning over the United Kingdom. *See* Ltr. by Royal Governor William Gooch, dated November 20, 1734, available at <https://www.orangecountyva.gov/DocumentCenter/View/2423>.

34. The County is governed by an elected Board of Supervisors of Orange County (the “**Board**”), which the General Assembly of Virginia has invested with the same powers and authority as the governing bodies of cities and towns, Va. Code § 15.2-1201, which include the power to regulate by ordinance, *inter alia*, the uses of land within the County and outside any municipality, *see, e.g.*, Va. Code §§ 15.2-2280, 15.2-2281.

35. Under Virginia law and Orange County Code, the Planning Commission of Orange County (the “**Commission**”) is tasked with consideration of various land use decisions, including those involved in the Rezoning. *See* Va. Code § 15.2-2210; *see, e.g.*, Va. Code § 15.2-2285(B); Va. Code § 15.2-2286(A)(7); Zoning Ordinance § 70-1; Zoning Ordinance § 70-2(1); Zoning Ordinance §§ 70-141, -142, -143, -145(c), -191, -193(f), -196, -212, -213.

36. The 2,618.47 acres ± of real property that is to be the site of the Wilderness Crossing Project is comprised of twenty (20) separate, contiguous parcels lying just north of Germanna Highway (Route 3), the southeastern tip of which fairly abuts Route 3’s intersection with Plank Road (running to the east), and Constitution Highway (Route 20), running northeast (the “**Wilderness Crossing Land**”).⁴

37. The Wilderness Crossing Land lies solely within the unincorporated territory of the County of Orange, Virginia, and is largely forested and unimproved.

38. The Wilderness Crossing Land was, prior to the Rezoning, approved variously for Agricultural (A), General Commercial (C-2), Limited Residential (R-1) Conditional, and General Industrial (I-2) Conditional uses, under the Zoning Ordinance.

⁴ The parcels that make up the Wilderness Crossing Land are identified in the land book of Orange County as bearing Tax Map Nos. 13-2, 13-3, 13-3A, 13-5B, 13-6, 13-6A, 13-6B, 13-6C, 13-7, 13-10, 13-11, 13-13, 13-16, 13-16B, 13-19, 13-20, 14-1, 24-2, 24-2A, and 24-9.

39. As of January 1, 2020 (the last reassessment), and so at the time of the Rezoning, the approximately 2,618.47 acres ± comprising the Wilderness Crossing Land was assessed, collectively, at \$14,073,000.00.

40. Title to the Wilderness Crossing Land is held by a total of eight (8) sets of owners, per the List of Owners, including the Applicant, KEG Associates III, LLC (individually, the “**Applicant**,” and together with all of the record owners of the Wilderness Crossing Land at the time of the Rezoning, the “**Developer**”).

41. The Wilderness Crossing Application was sought pursuant to the provisions of Zoning Ordinance § 70-194, governing zoning map amendments, mandating the same application submittals and review procedures “as those for special use permits,” and permitting the owner “to volunteer proffers in conjunction with the application.” Zoning Ordinance § 70-194.

American Battlefield Trust and Impacts to the Carr Tract.

42. American Battlefield Trust, successor of the Civil War Preservation Trust, is a not-for-profit Virginia nonstock corporation, and qualified as a tax-exempt organization under 26 U.S.C. § 501(c)(3) (the “**Trust**”).

43. The Trust exists to preserve America’s hallowed battlegrounds, including those of the American Civil War, and to educate the public about what happened on these battlefields and why those events and battles matter today.

44. The Trust has preserved over 56,000 acres of American battlefields at 158 sites in 25 states. This preservation occurs by various means, including by Trust ownership of historic lands.

45. As described more thoroughly below, the Trust has for many years been actively involved in studying, commenting and otherwise educating the public about proposed

development in the Germanna-Wilderness Area and the threat that such development, and in particular, the Rezoning, poses to the Wilderness and Chancellorsville Battlefields.

46. Pertinent to the Wilderness Battlefield, the Trust is presently the fee simple owner of approximately 1.3929 acres \pm of real property commonly known as 36525 Constitution Highway (Route 20), Locust Grove, Virginia, in Orange County, Virginia, bearing tax map parcel number 24-11C, PIN0240000000011C (the “**Carr Tract**”).

47. The Carr Tract sits approximately 2,000 feet from the southern edge of the Wilderness Crossing Land, along Constitution Highway near its intersection with Germanna Highway, and directly in the path of the transportation improvements contemplated by the Rezoning.

48. The Carr Tract lies within the core area of the Wilderness Battlefield, as determined by the Civil War Sites Advisory Commission (the “**CWSAC**”), a 15-member Commission appointed by the United States Secretary of the Interior pursuant to federal law to evaluate the importance, condition of, and the threats to American Civil War battlefields.

49. In a report entitled “The Report on the National Civil War Battlefields,” the CWSAC reviewed all 10,500 military actions of the American Civil War to prioritize the actions and sites according to historic significance and preservation priority, and selected only 384 sites as worthy of preservation. *See* Civil War Sites Advisory Commission, Report on the Nation’s Civil War Battlefields (1993) (the “**CWSAC Report**”), attached as **Exhibit 4**. The CWSAC Report was updated by the American Battlefield Protection Program, an agency within NPS, in reports dated 1998 and July 2009, relevant portions of which are attached as **Exhibits 5** and **6**.

50. The CWSAC identified the Wilderness Battlefield, which includes the Carr Tract, as a Priority I, Class A battlefield – its highest designation among sites worthy of preservation.

51. The CWSAC defines the Priority I rating as applying only to those battlefields in most critical need of preservation, and Class A as applying only to those battlefields “having a decisive influence on a campaign and a direct impact on the course of the war.”

52. The Carr Tract is also within the NPS-established boundary of the Wilderness Battlefield.

53. The Carr Tract was not only the site of military action during the Battle of the Wilderness, but is believed to be the site of one of the battlefield headquarters of Lieutenant General Ulysses S. Grant, the General-in-Chief of all the Union Armies, and Major General George G. Meade, commander of the Army of the Potomac, during the Battle of the Wilderness.

54. In light of its historical significance, the Trust secured a conservation easement “to protect in perpetuity the historic battlefield, archaeological, and open-space values on” the Carr Tract (the “**DHR Easement**”). A copy of the DHR Easement is attached as **Exhibit 7**.

55. The DHR Easement is held by the Virginia Board of Historic Resources, operating through the Virginia Department of Historic Resources (“**DHR**”).

56. Consistent with the DHR Easement and to enhance the visitor experience, the Trust expended considerable resources to remove non-historic structures from the Carr Tract, and hopes to eventually transfer the tract into the custody of the NPS to be integrated into the National Military Park and its existing Wilderness Battlefield visitor experience.

57. The extraordinarily intensive development of the now largely unimproved Wilderness Crossing Land that was approved by the Rezoning Ordinance threatens the Carr Tract with noise, dust, odor and light pollution; a dramatic increase in traffic disruption; viewshed impacts; the unimaginable loss of historic land to serve as the road bed for the relocated

intersection of Route 20 and Route 3; and run-off and other environmental impacts generated from site preparation and construction for the Wilderness Crossing Project.

58. As noted above, the Carr Tract is barely 2,000 feet from the southern edge of the Wilderness Crossing Land.

59. The portion of the Wilderness Crossing Land nearest the Carr Tract, referred to as “Land Bay J,” is slated for more than 25 acres of commercial development, which may include convenience stores, auto repair, sales and service, hotels or other short-term lodging, and the like.

60. These uses, which may include buildings as tall as 60 or even 80 feet, will permanently alter the viewshed from the Carr Tract, whose historic value is substantially related to the viewsheds it offered General Grant and his staff in May of 1864, and the visitors today, of the Wilderness Battlefield.

61. Access to and from the Carr Tract, and so its interpretation and enjoyment as an historic site, will also be burdened dramatically by the Wilderness Crossing Project.

62. Traffic on Germanna Highway, Plank Road, Constitution Highway, and adjoining roads, will be substantially burdened and disrupted by the proposed construction authorized by the Rezoning Ordinance, as construction materials, equipment, vehicles and workers will be traveling these roads for decades to come building out the Wilderness Crossing Project.

63. In fact, the Traffic Impact Analysis, as revised through November 14, 2022, that was submitted with the Wilderness Crossing Application (the “**TIA**”) estimates that as early as 2026 (the beginning of the initial phase of the Wilderness Crossing Project), nearby land, including the Carr Tract, will see an increase of at least 1,500 trips an hour, at peak times during the workweek, and over 16,000 trips daily, just in and out of the Wilderness Crossing Lands.

64. All of the aforementioned impacts undermine the historical value of the Carr Tract and the experience for the visitor thereto, and the traffic surge particularly exposes visitors to the Carr Tract, the National Military Park, and the Wilderness Battlefield generally to increased hazards when visiting these sites, whether by automobile or on foot, thereby discouraging and diminishing the use and enjoyment of these sites.

65. Additionally, the Carr Tract, less than 2,000 feet from where Germanna Highway (Route 3) and Constitution Highway (Route 20) intersect, is directly in the path of the transportation improvements contemplated by the Wilderness Crossing Project as approved by the Rezoning Ordinance.

66. Should the Wilderness Crossing Project advance, State Route 20 will be realigned, removing the existing access to the Carr Tract and relocating that expanded roadbed onto the Carr Tract. *See* GDP (Sheets 7 & 8).

67. Accordingly, the Wilderness Crossing Project, as approved by the Rezoning Ordinance, threatens to substantially diminish, if not destroy, the historic value of the Carr Tract as a portion of the Wilderness Battlefield and its interpretation, use and enjoyment as a site to educate the public about that terrible battle, values that the Trust and the Commonwealth of Virginia, by and through DHR, have expended substantial resources to secure, including through the DHR Easement.

68. Thus, the ability of the Trust to achieve its mission, carry out its purposes, and fulfill its responsibilities under its agreement with DHR, including to protect and preserve the Carr Tract of the Wilderness Battlefield, and to provide an educational experience to all visitors thereto, will be undermined by the Wilderness Crossing Project, including by the extraordinary and lengthy construction activity, the massive traffic increase, the realignment of Constitution Highway (Route

20) and the permanent viewshed impacts that that development portends for the Germanna-Wilderness Area.

69. Representatives of the Trust raised these and other concerns in public comments submitted to the Board and the Commission.

Friends of Wilderness Battlefield, Inc. and Impacts to the DHR Battlefield Tract.

70. Friends of Wilderness Battlefield, Inc. ("**FoWB**") is a not-for-profit Virginia nonstock corporation, and qualified as a tax-exempt organization under 26 U.S.C. § 501(c)(3), that exists primarily to assist NPS and DHR in their efforts to preserve the National Military Park particularly, and the Wilderness Battlefield generally, in Spotsylvania and Orange Counties.

71. FoWB was organized for the purpose of promoting for the benefit of the general public the preservation, protection and interpretation of the natural and historic resources of the Commonwealth of Virginia principally in the Wilderness area of Spotsylvania and Orange Counties; assisting in the preservation of areas of historic significance and promoting social welfare by combating community deterioration in the vicinity of Civil War battlefields and historic sites, with particular emphasis on the Wilderness Battlefield area located in Spotsylvania and Orange Counties; and conducting, sponsoring and facilitating the holding of special tours, lectures, conferences, seminars and other educational activities relating to the foregoing purposes, including many on the Wilderness Battlefield and in the vicinity thereof.

72. FoWB, under a long-standing agreement with DHR, which owns an approximately 48.58 acre ± parcel of land that directly abuts the Wilderness Crossing Land commonly known as 5527 Germanna Highway, Locust Grove, Virginia, 22508 the Orange County Parcel Id. No.: 02400000000080 (the "**DHR Battlefield Tract**"), also has the right and duty to access, maintain and use the DHR Battlefield Tract to conduct activities and events that educate the public regarding

the Wilderness Battlefield and the American Civil War (the “DHR Battlefield Tract Agreement”). A copy of the DHR Battlefield Tract Agreement is attached as Exhibit 8.

73. The DHR Battlefield Tract is located entirely within the study area of the Wilderness Battlefield as defined by the CWSAC, which gave the Wilderness Battlefield a Preservation Priority Rating of I.2, Class A.

74. FoWB regularly accesses, maintains and uses the DHR Battlefield Tract to assist DHR with the onsite stewardship of the DHR Battlefield Tract and to encourage tourism at that site and the Wilderness Battlefield as a whole.

75. The DHR Battlefield Tract abuts the southeastern portion of the Wilderness Crossing Land, sharing boundaries with the proposed Goldmine Parkway and the Wilderness Crossing Project development areas identified as Land Bay J, Land Bay N, Land Bay O, and Land Bay M.

76. The Rezoning Ordinance has approved these abutting Land Bays for a range of commercial and residential uses, including convenience stores, distilleries, retail shops, automotive sales, repair and service, and townhomes, among many others. *See* Land Use Chart at 6–9.

77. Many of these uses may rise 45 feet, 60 feet or even 80 feet in the air, dramatically and permanently altering the viewshed of the DHR Battlefield Tract.

78. Access to and from the DHR Battlefield Tract, and so its interpretation and enjoyment as an historic site, will be burdened dramatically by the Wilderness Crossing Project.

79. The Transportation Plan that is part of the GDP projects that more than 10,000 additional vehicles per day will travel the abutting Wilderness Crossing Land designated as Land

Bays N and J, the latter of which is slated to be the location of relocated Route 20, which will travel along the northwestern property line of the DHR Battlefield Tract.

80. The extraordinarily intensive development of the now largely unimproved Wilderness Crossing Land that the Rezoning Ordinance approved threatens the DHR Battlefield Tract with noise, dust, odor and light pollution; dramatic increase in traffic along Routes 3 and 20, which presently intersect at the corner of the DHR Battlefield Tract; traffic disruption attending construction of development; as well as viewshed impact, run-off and other environmental impacts generated from site preparation and construction for the Wilderness Crossing Project.

81. The ability of FoWB to achieve its mission, carry out its purposes, and fulfill its responsibilities under its agreement with DHR, including to protect and preserve the DHR Battlefield Tract of the Wilderness Battlefield and to provide an educational experience to all visitors thereto, will be undermined by the Wilderness Crossing Project, including by the extraordinary and lengthy construction activity, the massive traffic increase, and the permanent viewshed impacts that that development portends for the Germanna-Wilderness Area.

82. Representatives of the FoWB raised these and other concerns in public comments submitted to the Board and the Commission.

Central Virginia Battlefields Trust, Inc. and Impacts to the CVBT Tracts.

83. Central Virginia Battlefields Trust, Inc. ("**CVBT**"), is a non-stock, non-profit corporation organized under the laws of the Commonwealth of Virginia and recognized as exempt under 26 U.S.C. § 501(c)(3) that is dedicated to the preservation of Virginia's Civil War battlefields, particularly land associated with the four major campaigns in central Virginia—Fredericksburg, Chancellorsville, Mine Run, and the Overland Campaign, including the Battles of the Wilderness and Spotsylvania.

84. CVBT owns one 2.00 acre \pm parcel in Orange County, Virginia, lying just south of Germanna Highway (Route 3), and west of where Constitution Highway (Route 20) intersects with Germanna Highway, commonly known as 0 Lyndon Drive, Locust Grove, Virginia, 22508, and having the Orange County, Virginia Parcel Id. No.: 0240000000011J (the “**CVBT Orange Tract**”).

85. The CVBT Orange Tract is directly across Route 3 from the DHR Battlefield Tract, less than 1,000 feet from the boundaries of the Wilderness Crossing Land, particularly that parcel bearing Orange County Parcel Id. No.: 02400000000090.

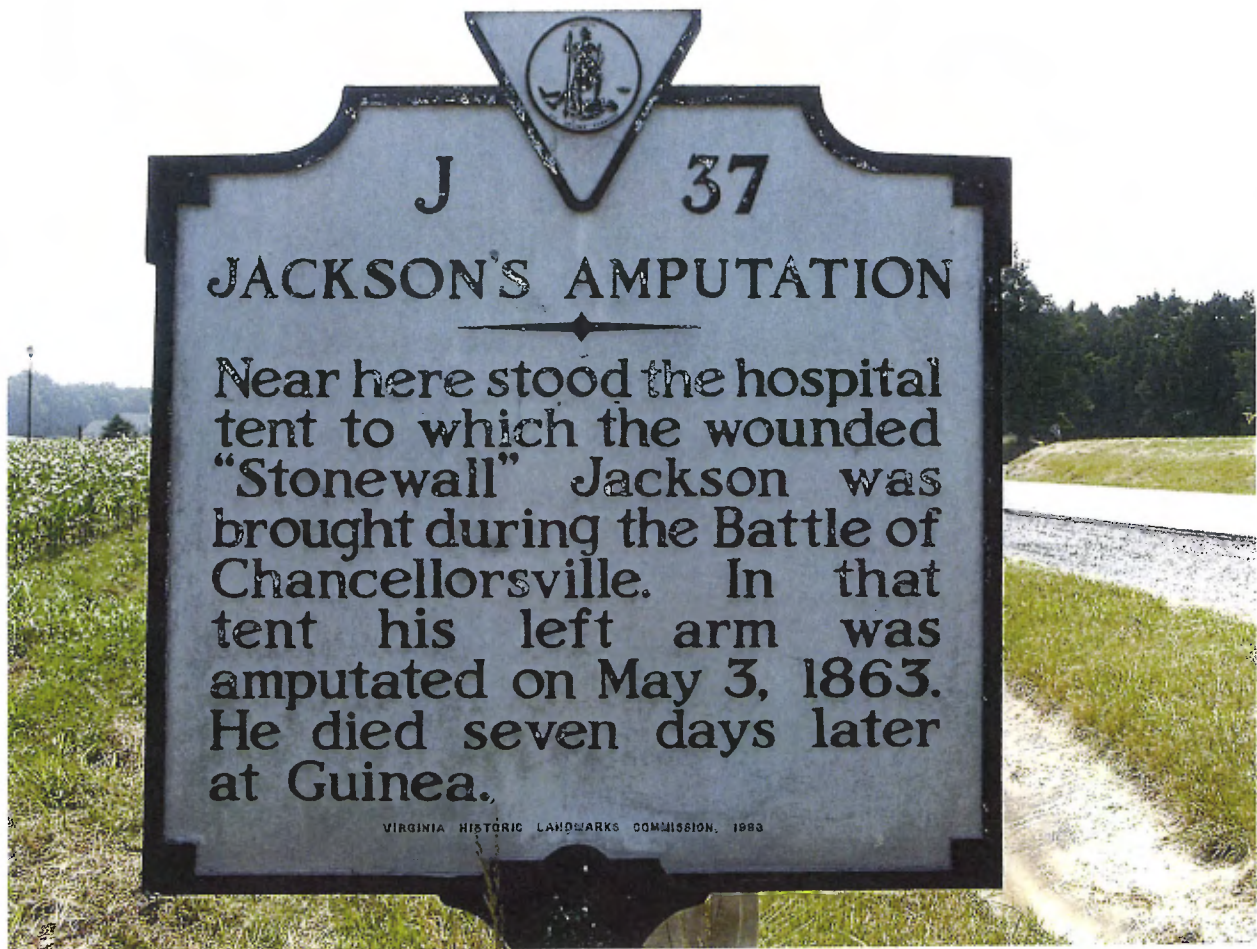
86. The CVBT Orange Tract is located entirely within the core area of the Wilderness Battlefield as defined by the CWSAC, which gave the Wilderness Battlefield a Preservation Priority Rating of I.2, Class A, and is also within the NPS-established boundary of the Wilderness Battlefield.

87. CVBT also owns two other parcels of land with significant historical and cultural value that are located in Spotsylvania County, along the intersection of Germanna Highway/Plank Road, across from NPS property and Lyons Lane, and the second lying just west of where Constitution Highway (Route 20) intersects with Germanna Highway (Route 3).

88. The parcel nearest this Plank-Road/Germanna Highway intersection consists of 81.66 acres \pm , sits on the northern side of Germanna Highway/Plank Road, extends eastward to the intersection with Brock Road at Wilderness Corner, and is commonly known as 0 Plank Road, Spotsylvania, Virginia, 22553, having the Spotsylvania County, Virginia Parcel Id. No.: 7080-82-6535 (the “**Northern CVBT Tract**”).

89. Most of the Northern CVBT Tract is part of the study area of the Wilderness Battlefield, as defined by the CWSAC, and all of it is within the study area of the Chancellorsville Battlefield.

90. The Northern CVBT Tract hosts a Virginia State Historical Highway Marker, J-37, recounting key events that occurred on the site in the Battle of Chancellorsville (April 30 – May 6, 1863). That marker is pictured below.



91. The second parcel owned by CVBT in Spotsylvania County consists of 61.96 acres \pm , sits on the southern side of Germanna Highway/Plank Road, across the street from portions of the Northern CVBT Tract, is associated with the Wilderness Tavern, an important landmark connected with both the Wilderness and Chancellorsville campaigns, and is commonly known as

11006 Plank Road, Spotsylvania, Virginia, 22553, having the Spotsylvania County, Virginia Parcel Id. No. 8-A-3F (the “Southern CVBT Tract”).

92. Portions of the Southern CVBT Tract are located within the core area of the Wilderness Battlefield as defined by the CWSAC, while the remainder is within the study area of that battlefield as well as of the Chancellorsville Battlefield.

93. The Northern and Southern CVBT Tract include significant portions of strategically important junctures and landmarks at the Battle of the Wilderness, key not only to the movement of men and material, but also where the Union Army was seeking a southward route to Richmond.

94. At the conclusion of the engagement, and despite the large losses, General Grant directed the Army of the Potomac southward, pass these Tracts and toward Richmond, Virginia, eliciting cheers from the Union soldiers.

95. Access to and from the various CVBT Tracts, and so their interpretation, use, and enjoyment as historic sites, will be burdened dramatically by the Wilderness Crossing Project.

96. Although the TIA failed to consider the effect of the Wilderness Crossing Project on roads outside Orange County, it is certain that the extraordinary upsurge in traffic will be felt on Plank Road and adjoining lands in the immediate vicinity of the Wilderness Project, including the Northern and Southern CVBT Tracts.

97. The Transportation Plan that is part of the GDP also proposes numerous changes to Germanna Highway (Route 3) that will affect access to lands across that road from the Wilderness Crossing Project, including the CVBT Orange Tract. *See* GDP (Sheet 8); Rezoning Ordinance (Voluntary Proffer Statement III.A(1)–(9)).

98. More concerning still, the Transportation Plan appears to relocate the roadbed for Route 20, and its intersection with Route 3, onto or in the immediate vicinity of the CVBT Orange Tract. *See* GDP (Sheet 8).

99. All of these effects of the Wilderness Crossing Project will diminish the value of the aforementioned lands owned by the CVBT (collectively, the “**CVBT Tracts**”) for historical and educational use, interpretation and enjoyment for all those visiting and studying the Wilderness Battlefield.

100. The extraordinarily intensive development of the now, largely unimproved Wilderness Crossing Land that the Rezoning Ordinance approved uniquely threatens the CVBT Orange Parcel with noise, dust, odor and light pollution; a dramatic increase in traffic along Route 3; lengthy traffic disruptions attending the development’s construction; the unimaginable loss of historic land to serve as the road bed for the relocated intersection of Route 20 and Route 3; viewshed impact, run-off and other environmental impacts generated from site preparation and construction for the Wilderness Crossing Project.

101. Thus, the ability of CVBT to achieve its mission and carry out its purposes, including to protect and preserve the CVBT Tracts that comprise significant locations within the Wilderness Battlefield, will be undermined by the Wilderness Crossing Project, including by the extraordinary and lengthy construction activity, the massive traffic increase, and the permanent viewshed impacts that that development portends for the Germanna-Wilderness Area.

102. Representatives of CVBT raised these and other concerns in public comments submitted to the Board and the Commission.

Mark and Cheryl Nowacki and Impacts to the Nowacki Tract and Nowacki Home.

103. Mark W. and Cheryl M. Nowacki are long-time residents, taxpayers and citizens of Orange County, Virginia.

104. Mr. and Mrs. Nowacki own and reside at real property commonly known as 3 Rapidan Road, Locust Grove, Virginia, 22508, having the Orange County, Virginia Parcel Id. No.: 012A0001600030 (the "**Nowacki Tract**").

105. The Nowacki Tract, and the Nowackis, are uniquely positioned to be adversely affected by the construction and uses on the Wilderness Crossing Land approved by the Rezoning.

106. The Nowacki Tract is a 5 acre \pm parcel, and is part of a secluded, four-lot section of the Lake of the Woods community, situated a short distance off of Germanna Highway (Route 3).

107. Designed for outdoor activities, including hiking, trail walks, and other recreational activities, the Nowacki Tract is located on a cul-de-sac, with many mature trees, and is surrounded by forests.

108. The Nowackis purchased the Nowacki Tract for the natural beauty and quiet seclusion the location afforded and built a home on that property approximately 18 years ago, raising their two children there (the "**Nowacki Home**").

109. The Nowackis reach their Home by turning off of Germanna Highway (State Route 3), which Mr. Nowacki travels daily, past the Wilderness Crossing Lands, during the work week to Culpeper, where he has served for 26 years as the director for Culpeper County's Victim/Witness Program, following his service in the United States Air Force. Mr. Nowacki also travels portions of Plank Road in his commute.

110. Ms. Nowacki is a 16-year employee of Mary Washington Healthcare hospitals, and travels the same route to the City of Fredericksburg for her employment.

111. The Nowackis also occasionally travel Constitution Highway (State Route 20) when going to and from the Nowacki Home.

112. Traffic on Germanna Highway, Plank Road, Constitution Highway, and adjoining roads, will be substantially burdened and disrupted by the proposed construction authorized by the Rezoning, as construction materials, equipment, vehicles and workers will be traveling these roads for decades to come building out the Wilderness Crossing Project.

113. As previously alleged, the TIA estimates that as early as 2026 (the beginning of the initial phase of the Wilderness Crossing Project), nearby landowners such as the Nowackis will see an increase of at least 1,500 trips an hour, at peak times during the workweek, and over 16,000 such trips daily, just in and out of the Wilderness Crossing Lands.

114. Over the decades of construction that will occur on the Wilderness Crossing Project, the Nowackis will be harmed by the traffic disruption, noise, dust, odor, light, viewshed impacts, and run-off and other environmental impacts generated from site preparation and construction.

115. From when the Nowacki Home was constructed through the present, the Nowackis have enjoyed the sanctuary provided by the Nowacki Home and Nowacki Tract, and hosted various memorable activities there, from hiking, family celebrations, church barbecues and social gatherings, and an array of backyard recreation activities, from badminton to cornhole.

116. As the single-family home is oriented to the east, the Nowackis enjoy the sun rising through the trees from the back deck of their long-time family home and intend to remain in the home until the end of their days.

117. The Nowacki's children, now grown, have a deep affection for the Nowacki Tract and are bound to it by many happy memories. Their children have expressed a desire to keep the Property in the family when the time comes, a desire the Nowackis' share.

118. The Nowacki Tract abuts the Wilderness Crossing Land, and abuts the portion slated for development as Land Bay A, as depicted in the GDP and Land Use Chart that are part of the Rezoning Ordinance.

119. The Nowackis Tract and Home will be directly impacted by the noise, dust, odor, light, increased traffic, traffic disruption, viewshed impact, run-off, flooding and other environmental impacts from the construction and uses of the Wilderness Crossing Land, especially but not exclusively at Land Bay A, in the following ways:

a. Just in the area around Land Bay A, dozens of acres of mature timberland, immediately behind the Nowacki Tract will be cleared to permit industrial land use near the Nowacki Home. This clearing will permanently alter the viewshed from the Nowacki Home, and expose it to noise, dust, odor, and light pollution, as well as erosion and sedimentation, both during construction and thereafter.

b. Furthermore, the Nowacki Tract sits in the dam break inundation zone for the Veterans Memorial Dam, also referred to as the Lake of the Woods Keaton Dam Inundation Zone, *see* GDP (Sheet 4), which dam is located just south of Route 3 from the Wilderness Crossing Land, and a stream, known as Flat Run, runs along the back of the Nowacki Tract onto the Wilderness Crossing Land.

c. Given these facts and the development approved by the Rezoning Ordinance, particularly in Land Bay A, the Nowackis face the certainty of being exposed to additional erosion and sedimentation of the Nowacki Tract, as well as an increased risk

of outright flooding, with the attendant erosion, damage and expense that such flooding brings.

d. The seriousness of these harms to the Nowacki Tract is expected to be greater than that suffered by other abutting landowners for the additional reason that Land Bay A is slated for various industrial uses. *See* Land Use Chart at 6–7. Such uses will increase the extent of earthmoving and grading required, the intensity of construction noise, dust and odor attending that construction, and the resulting impact of the finished use to the quiet use and enjoyment of the Nowacki Tract, whose viewshed will come to include the industrial and commercial buildings and activities constructed in Land Bay A. A mere 100-foot setback is all that is required between the Nowacki Tract and these industrial uses. *See* Rezoning Ordinance (Voluntary Proffer Statement II.G(7)).

e. Per the GDP, 256 vehicles per day are expected to travel into Land Bay A, a number that could increase depending on the use selected, and which could include “wholesale distribution or warehouse” uses, bringing heavy truck traffic nearby their home. *See* GDP (Sheet 8); Land Use Chart at 6–7.

f. Additionally, the portion of Route 3 in the immediate vicinity of the Nowacki Tract, and which is regularly traveled by to and from the Nowacki Tract, will see an increase of daily traffic in the many thousands, burdening the Nowackis’ commute and ingress and egress to and from the Nowacki Home, and disturbing its solitude. *See* GDP (Sheet 8).

g. The prelude to this upsurge will be the creation of numerous additional stops, turning lanes, and travel restrictions, necessitating substantial and elongated construction on portions of Route 3 near the Nowacki Tract and used by the Nowackis in

their commute and ingress and egress to and from the Nowacki home. *See* GDP (Sheet 8); Rezoning Ordinance (Voluntary Proffer Statement III.A).

120. To meet the water capacity and pressure requirements of the Wilderness Crossing Project, which will require hundreds of thousands of gallons of potable water a day, a water tower is slated to be constructed behind Land Bays A and D, a short distance from the edge of the Nowacki Tract. *See* GDP (Sheet 7).

121. Given the lack of any height limitations on water towers under the Rezoning Ordinance and the expected water capacity and pressure requirements for as many as 5,000 residences, the Nowackis anticipate that the water tower, among other improvements in the Wilderness Crossing Project, will be visible from their home.

122. Finally, the Nowackis will be harmed by a loss of value to the Nowacki Home and Property, as the land and improvements will be far less desirable in the marketplace because of the noise, dust, odor, light, viewshed impact, run-off, flooding and other environmental impacts from the development of the Wilderness Crossing Project, impacts that will uniquely fall upon the Nowacki Tract as a result of its abutting the Wilderness Crossing Land and the construction and uses thereof approved by the Rezoning Ordinance.

123. The Nowackis raised these and other concerns in public comments submitted to the Board and the Commission.

Robert J. Foster, Individually and as Trustee of the Robert J. and Joanne S. Foster Living Trust and Impacts to the Foster Tract.

124. Mr. Robert J. Foster, a long-time resident and citizen of Spotsylvania County, serves as trustee of the Robert J. and Joanne S. Foster Living Trust (the "**Foster Trust**").

125. The sole beneficiaries of the Foster Trust are Mr. Foster's nephew, a U.S. Army retiree and veteran of two tours in Iraq and two tours in Afghanistan, and his wife. Mr. Foster's

nephew was awarded a purple heart while serving in Baghdad, and receives disability for his service to our country. Mr. Foster's nephew has one minor son, whom Mr. Foster's nephew and wife support.

126. The Foster Trust owns a 24.61 acre \pm parcel commonly known as 10812 Millridge Lane, Spotsylvania, Virginia 22533, Spotsylvania County tax map parcel number 2-A-4 (the "**Foster Tract**").

127. The Foster Tract runs west to the county line, to the middle of Wilderness Run and abuts, on the east, the Wilderness Crossing Land, mostly the 853.89 acre \pm parcel in Orange County, Virginia bearing Parcel Id. No.: 01300000000070, but also the 57.886 acre \pm and 13.450-acre \pm parcels, bearing Parcel Id. Nos.: 01300000000200 and 01300000000190, respectively, all of which are owned by the Applicant. *See* GDP (Sheet 2).

128. Along the Foster Tract's western boundary with that Wilderness Crossing Land parcel, and again along the western half of the Foster Tract, flows Wilderness Run.

129. Mr. Foster, a widower and retired Lieutenant Colonel, U.S. Army, who served in Desert Storm, resides on the Foster Tract, in a 3,000 square-foot single family residence, with a walkout basement.

130. Mr. Foster uses most of the unimproved land for forestry and farm activities, including pastureland for his horse.

131. Mr. Foster has improved the Foster Tract to support these activities, including with a 5 stall horse barn, a more than 6,000 sq. foot shop, and a smaller detached shed.

132. The Foster Tract, and Mr. Foster personally, are uniquely situated to be adversely affected by the construction of the Wilderness Crossing Project and the uses thereon authorized by the Rezoning Ordinance.

133. Most of the Foster Tract, including most of these improvements, lie at or below 248 feet in elevation.

134. As illustrated in the GDP, most of the Foster Tract is located in what it described as the “Lake of the Woods Keaton Dam Inundation Zone.” GDP (Sheet 4).

135. To increase water capacity sufficient to serve the Wilderness Crossing Project, the Wilderness Crossing Application proposed, and the Rezoning Ordinance approved, the future impoundment of Wilderness Run and the Developer’s dedication of approximately 204 acres ± for a “Potential Reservoir Impoundment Area,” “as generally shown on Sheet 6 of the GDP.” Rezoning Ordinance (Voluntary Proffer Statement II.G(1)).

136. Sheet 6 of the GDP shows the Foster Tract almost entirely within a large “Potential Reservoir Impoundment Area” along the eastern edge of the Wilderness Crossing Land, and the Foster Tract being all-but-completely flooded should that impoundment of Wilderness Run occur.

137. The Potential Reservoir Impoundment Area has, with respect to the Foster Tract, essentially the same, but a larger, footprint as the Lake of the Woods Keaton Dam Inundation Zone, meaning that any substantial overrun from that dam would finish the job, and effectively flood any dry remainder of the Foster Tract.

138. Should such an impoundment occur, the sole ingress-egress to and from the Foster Tract, Black Meadow Road (Route 640), will be cut-off.

139. Effectively, the Foster Tract will no longer have any value for agricultural purposes, and may have negative value, becoming a man-made swamp.

140. To serve the Wilderness Crossing Project’s water supply needs, Wilderness Run will be impounded, a process that must advance “prior to the initial site plan approval for any new

improvements” on the Wilderness Crossing Land. Rezoning Ordinance (Voluntary Proffer Statement II.G(3)).

141. In short, development of the Wilderness Crossing Project, as approved by the Rezoning Ordinance, will cause flooding of all portions of the Foster Tract up to the 248 feet in elevation, which accounts for as much as 95% of the land area in the Foster Tract.

142. But for the Wilderness Crossing Project, the additional water capacity would not be required and the impoundment of Wilderness Run and the resulting loss of the Foster Tract would not be advancing.

143. The Foster Tract lies nearest the areas projected for development under the Rezoning that are referred to in the Land Use Chart as “Land Bay P” and “Land Bay Q.”

144. These areas are slated for residential and some commercial uses, as well as a telecommunications tower(s), *see* Land Use Chart at 8–9, although they could be subjected to even more intense uses at the discretion of the Developer. *See* Rezoning Ordinance (Voluntary Proffer Statement II.B(5)).

145. Should the Wilderness Crossing Project advance as approved by the Rezoning Ordinance, the Foster Tract, and Mr. Foster’s use and enjoyment thereof, will, in addition to being flooded, be particularly affected by the noise, dust and light pollution from the construction and development of these abutting areas just to the west of the Foster Tract.

146. These harms to the Foster Tract would be exacerbated by its relative lower elevation, enhancing the viewshed impacts on the Foster Tract of the buildings and tower(s) built thereon.

147. Finally, the Foster Trust will be harmed by a loss of value to the Foster Tract, as the land and improvements will be far less desirable in the marketplace because of the loss of land

from flooding, as well as the noise, dust, odor, light, viewshed impact, run-off, and other environmental impacts from the development of the Wilderness Crossing Project, impacts that will uniquely fall upon the Foster Tract as a result of its adjacency to the Wilderness Crossing Land and the construction and uses thereof approved by the Rezoning Ordinance.

148. Mr. Foster raised these and other concerns in written public comments submitted to the Board prior to adoption of the Rezoning Ordinance, but to no avail.

149. A map depicting the location of the lands either owned or occupied by the Citizens, the core and study areas of the Wilderness and Chancellorsville Battlefields, and the National Military Park, as well as those features' proximity to the Wilderness Crossing Land is attached as Exhibit 3.

JURISDICTION & VENUE

150. This Court has jurisdiction pursuant to Code §§ 2.2-3713(A)(1), 8.01-184, 8.01-626, 15.2-2285, and 17.1-500 because this Petition seeks a declaratory judgment and injunctive relief based on unlawful legislative acts by the Board, which took place in the County, contests a zoning decision of the Board, especially the Rezoning, and involves land and development activity to be restrained that is to occur within the County, although its effects will be felt well beyond its boundaries.

151. Venue lies in this Court pursuant to Code §§ 2.2-3713(A)(1), 8.01-185, 8.01-261, 8.01-262, 8.01-627, and 15.2-2285 and County Code §§ 70-91 and 70-197.

GENERAL ALLEGATIONS

Germanda-Wilderness Area Plan.

152. In 2009, the Board approved a proposed development by Wal-Mart on the site of the DHR Battlefield Tract, igniting litigation that concluded following the first day of trial, with

Walmart renouncing its proposed development on that site, donating that tract to DHR and, ultimately, building its proposed store in another location. *See Friends of Wilderness Battlefield, et al. v. Board of Supervisors of Orange County, et al.*, Case No. CL09000240-00 (Orange Cty. May 12, 2011); Linda Wheeler, Washington Post, *Wilderness Battlefield Land donated by Walmart* (Nov. 10, 2023), https://www.washingtonpost.com/blogs/house-divided/post/wilderness-battlefield-land-donated-by-wal-mart/2013/11/10/fe307b52-4a24-11e3-9890-a1e0997fb0c0_blog.html; Am. Battlefield Trust, *Walmart Controversy Fully Resolved*, <https://www.battlefields.org/learn/articles/walmart-controversy-fully-resolved>

153. In the aftermath of that controversy, the County sought to develop a comprehensive vision for appropriate development in the northeastern corner of the County, one that would, among other things, “celebrat[e] the area’s historical and cultural heritage.”

154. Toward that end, various nonprofit organizations, including the Trust, FoWB, and CVBT, underwrote a study that identified various cultural and historic resources in the vicinity of the Wilderness Battlefield, entitled the “Wilderness Battlefield Gateway Study.”⁵

155. Following a lengthy period of study and extensive outreach for input from area residents and organizations, and building on the Wilderness Battlefield Gateway Study, on July 14, 2015, the Board adopted amendments to the County’s current Comprehensive Plan to incorporate the “Germanna-Wilderness Area Plan,” herein referred to as the GWAP.

156. The Wilderness Crossing Land comprises most of what is termed “Subarea Four: Wilderness Run” in the GWAP.

⁵ An electronic copy of the two phases of that study may be found here: https://www.battlefields.org/sites/default/files/2023-02/wbgs-phase-1-report-web_0.pdf, and here: <https://www.battlefields.org/sites/default/files/2023-02/wbgs-phase-2-report-web.pdf>.

157. For Subarea Four, the GWAP specifically directs the reader to the Wilderness Battlefield Gateway Study, Plan at 29, which is an exhibit to the GWAP and maps key cultural and historic sites and protected lands, many of which are shown either located on or adjacent to the Wilderness Crossing Lands.

158. For Subarea Four, the GWAP also lists an array of planning and zoning tasks to be completed to guide future development, among them a process to “amend the zoning ordinance to create planned unit development zoning districts as the primary zoning instrument” Plan at 35.

Planned Development – Mixed Use Zoning District.

159. Following on the directions in the Germanna-Wilderness Area Plan, a zoning text amendment proposing to add Article IV, Division 13 to the Zoning Ordinance, which included Sections 70-567A through 70-567F, a new “Planned Development – Mixed Use” or “PDM” District, ZTA 18-05 (the “**PDM Zoning Amendment**”) came before the Planning Commission of Orange County in the first half of 2018.

160. On June 7, 2018, the Commission recommended approval of the PDM Zoning Amendment.

161. At a public hearing on July 24, 2018, the Board adopted an ordinance to approve the PDM Zoning Amendment (the “**PDM Zoning Ordinance**”). A copy of the PDM Zoning Ordinance is attached as **Exhibit 9**.

162. The PDM Zoning Ordinance thus brought into being the PDM zoning district, one of the unique zoning districts for the Germanna-Wilderness Area.

163. As suggested by the GWAP, other amendments to the Zoning Ordinance were adopted to add Article IV, Divisions 12 and 14 to the Zoning Ordinance, thereby creating the

“Planned Development – Business” or “PDB” District and the “Planned Residential – Traditional Design” or “R-5” District.

Wilderness Crossing Land Zoning & Planning History.

164. On April 13, 2021, the Developer sought to rezone the Wilderness Crossing Land, which is subject to the GWAP, along with a parcel in Spotsylvania County, to the new PDM zoning district, REZ 21-02.

165. Immediately, the NPS took an interest in the proposed development, sending letters in September and October 2021, raising concerns and seeking an opportunity to meet with County representatives.

166. Additionally, the Wilderness Battlefield Coalition sent a letter in October 2021 to the Board and the County, raising concerns and seeking a meeting.

167. All of these requests went unanswered and no meetings occurred.

168. Facing substantial public opposition, and following public disclosure of the environmental contamination issues existing on the Wilderness Crossing Lands, the Developer permitted this initial zoning map amendment application to expire.

The County’s Processing of the Wilderness Crossing Application.

169. On June 1, 2022, the Applicant filed another application for a zoning map amendment, again seeking rezoning of the Wilderness Crossing Land to the new PDM zoning district, REZ 22-03.

170. The Wilderness Crossing Application was submitted pursuant to Zoning Ordinance § 70-194, which obliges the Applicant to meet all of the “submittal requirements” of Zoning Ordinance § 70-145.

171. In July 2022, the Zoning Administrator referred the Wilderness Crossing Application to the Commission, apparently deeming it to have provided “all of the required information, in appropriate detail,” as required by Zoning Ordinance § 70-145(b).

172. Per the Zoning Ordinance, the Commission must “hear and provide recommendations on all proposed zoning map amendments,” Zoning Ordinance § 70-196, a Code requirement too. Va. Code § 15.2-2285(B).

173. Concerns about the Wilderness Crossing Project and its potential detriment to, among other public goods, historical and natural resources in the vicinity were immediately raised, and efforts to consult again undertaken, by NPS, the Wilderness Battlefield Coalition and others.

174. The Wilderness Battlefield Coalition, which includes the Trust, FoWB, and CVBT, in particular submitted numerous requests for meetings and offered comments, raised questions and sought answers. A copy of the last correspondence to the Commission, raising questions and seeking an audience, dated February 7, 2023, is attached as Exhibit 10.

175. This request, like the rest, was rebuffed, and no meeting occurred.

176. Undeterred, the Wilderness Battlefield Coalition and its individual members sought to gain information about the Wilderness Crossing Application and the process of review, and to inform members of the public regarding the same.

177. One such member of the Wilderness Battlefield Coalition, The Piedmont Environmental Council (“PEC”), a Virginia nonstock corporation, donor supported 501(c)(3) nonprofit and an accredited land trust, has been particularly active following, evaluating and offering technical and public comment upon the Wilderness Crossing Application since the first application was submitted in March of 2021. *See* The Piedmont Environmental Council, Wilderness Crossing, <https://www.pecva.org/wilderness-crossing/>.

178. PEC has sought to raise awareness of the serious environmental concerns existing on the Wilderness Crossing Land, which is the site of approximately fifteen (15) unreclaimed gold mining sites that contain substantial contaminants, such as mercury, arsenic, cadmium and lead.

179. The detritus of these mining activities, particularly toxic tailings, continue to leach into ground and surface water and contribute to mercury impairment of Shotgun Branch, Wilderness Run, and ultimately the adjacent Rapidan River and Rappahannock River, waterbodies into which the aforementioned rivers flow, and to the watershed in the surrounding vicinity.

180. PEC has collected various historical and technical materials demonstrating these and other serious environmental concerns at the Wilderness Crossing Land that it has made generally available to the public here: <https://www.pecva.org/region/orange/historic-gold-mining-contamination/>.

181. According to an article maintained by the United States Department of the Interior, U.S. Geological Survey, the Vacluse gold mine, the largest of the mines on the Wilderness Crossing Land and a major source of Virginia's antebellum gold production, was worked as recently as November 1938. *See* U.S. Dep't of Interior, U.S. Geological Survey, The Vacluse gold mine, Orange County, Virginia (1940), <https://www.usgs.gov/publications/vacluse-gold-mine-orange-county-virginia>; Piedmont Env'tl. Council, Shocking news about historic gold mine contamination (Jan. 6, 2023), <https://www.pecva.org/wp-content/uploads/Vacluse-Mine-History-Charles-Bass-1940.pdf>.

182. Per that article, "[a]pproximately 4,500 feet of core drilling was done below the 300-foot level."

183. Today, the Vacluse gold mine is known to be the source of severe environmental harm due to mercury contamination of groundwater and surface water on or about the site, resulting

from the methods used to extract gold ore from the host rock. See Virginia Energy, Abandoned Mineral Mine Lands (June 6, 2019), <http://www.pecva.org/wp-content/uploads/Vaucluse-Mine-DMME-Site-Summary.pdf>.

184. This and other information was presented to County staff, the Commission, and the Board by PEC and others to insist that the Applicant provide, among other things, an “environmental impact analysis” for the Wilderness Crossing Project, as required by Zoning Ordinance § 70-145(a)(3)(e).

The Withholding of Public Records Relating to the Wilderness Crossing Application

185. In addition to informing the County, the Commission, and the Board through its research and advocacy, PEC has sought to inform the public relating to the Wilderness Crossing Application, including in making various requests for public records under the Virginia Freedom of Information Act.

186. On September 28, 2022, PEC requested “copies (electronic preferred) of meeting minutes and any and all correspondence between County elected or appointed officials, staff and/or consultants, and” the Developer or its representatives, including but not limited to those “relating to the pending rezoning case for Wilderness Crossing and/or the proposed realignment of Rte. 20.”

187. Throughout the course of a rolling production agreed to by PEC with the County, the County took the position that hundreds of responsive public records were exempt from the requirements of the Virginia Freedom of Information Act because the subject of alleged non-disclosure agreements, relying on Virginia Code § 2.2-3705.6(3).

188. On February 2, 2023, PEC specifically requested copies of the non-disclosure agreements, both to test these claims of exemption and to ascertain with whom the County officials, including various members of the Board, had non-disclosure agreements.

189. The County flatly refused to provide any portion of the non-disclosure agreements, asserting that these too were exempt, pursuant to Virginia Code § 2.2-3705.6(3).

Commission Hearings and Action on the Wilderness Crossing Application

190. After a spate of work sessions, the Commission held its first public hearing on the Wilderness Crossing Application on March 23, 2023.

191. Approximately 150 members of the public attended, and about fifty (50) spoke. Many citizens spoke in opposition; none spoke in support.

192. At that hearing, the Commission sought various revisions to the proposed proffers, and deferred action on the Wilderness Crossing Application, pending those revisions.

193. A mere two weeks later, on April 6, 2023, the Commission took up again the Wilderness Crossing Application in a public hearing, although no public comment was permitted.

194. The Applicant submitted a revised set of proffers dated March 31, 2023 (the “**March Proffers**”), and over the strenuous opposition of two of the its members, the Commission proceeded to recommend approval of the Wilderness Zoning Application, 3-2, on April 6, 2023 (the “**Wilderness Crossing Recommendation**”). A copy of the March Proffers is attached to the Wilderness Crossing Recommendation, both of which are attached as **Exhibit 11**.

Building Height Amendment

195. In the midst of the Commission’s consideration of the Wilderness Crossing Application, the Board realized that the building heights desired by the Developer were not permissible under the existing PDM district regulations.

196. In a rush to approve the Wilderness Crossing Application, on March 14, 2023, the Board resolved to initiate an amendment to the Zoning Ordinance, particularly to § 70-567C(e) and § 70-567F(a), to authorize uses within the PDM district to be permitted to have building

heights “above 45” under an “overall development or master plan,” but, pertinent here, only “for specifically identified and proffered uses” (the “**Building Height Amendment Initiating Resolution**”). A copy of the Building Height Amendment Initiating Resolution is attached as **Exhibit 12**.

197. Rather than permit a regular review process of 100 days, the Board stipulated in the Building Height Amendment Resolution “that the Planning Commission shall act upon said proposed amendments within thirty (30) days of the adoption of this Resolution, pursuant to §15.2285(B) of the Code of Virginia.”

198. Thus, in addition to making the Wilderness Crossing Recommendation at the public hearing on April 6, 2023, the Commission also recommended approval, 5-0, of the proposed building height amendment initiated by the Board (the “**Building Height Recommendation**”).

199. Accordingly, at the next public hearing, on April 25, 2023, the Board adopted the amendment to the Zoning Ordinance proposed by the Building Height Amendment Initiating Resolution (the “**Building Height Amendment**”). A copy of the ordinance adopting the Building Height Amendment, Ordinance Number 230425 – PH2 (the “**Building Height Ordinance**”) is attached as **Exhibit 13**. A recording of the proceedings on the Building Height Amendment may be found at <https://orangecova.portal.civicclerk.com/event/271/media>, beginning at 1:30:04 and concluding at 1:33:09.

200. The Board would utilize this revised Zoning Ordinance to approve the Rezoning, which by its terms permits zoning heights “above 45” feet in the Wilderness Crossing Project, in fact, as much as 80’ for certain uses, and no height limitation for others, particularly “electric transmission, distribution, and substation facilities, and towers (water or other).” See Ex. 2 (Voluntary Proffer Statement II (G)(5)) & Ex. C (Land Use Chart).

April 13 Meeting of the Board

201. After the Wilderness Crossing Recommendation and the Building Height Recommendation, but before the next public hearing, four of the five members of the Board—Messrs. Lee Frame, Jim Crozier, Jim White and Keith Marshall—attended and spoke at a meeting of the Economic Development Partners Group (“EDPG”), which occurred at 2:00 p.m. on April 13, 2023 (the “April 13 Meeting”).

202. Of the members of the Board, only District One Supervisor, R. Mark Johnson, was not in attendance at or, apparently, invited to attend the April 13 Meeting.

203. The day prior, advertisement of the Wilderness Crossing Application for a public hearing to occur on April 25, 2023 had been published (the “April 12 Notice”). A copy of the April 12 Notice is attached as Exhibit 14.

204. The EDPG bills itself, including in the informal agenda for that meeting (the “EDPG Agenda”), as a “collaborative discussion group comprised of the Thought-Leaders interested in the local economic development success especially the Germanna Wilderness Area.” A copy of the EDPG Agenda and cover email are attached as Exhibit 15.

205. The first item on the EDPG Agenda, which was last modified by Supervisor Lee Frame on April 10, 2023 and was circulated to the group by him, was “Wilderness Crossing Discussion.” The next item on the EDPG Agenda was “BOS and BB update by BOS and LOW, Jim White.” Other items on the EDPG Agenda included “Planning Commission update, Wilderness Crossing”

206. In fact, in the cover email from Supervisor Frame, he stated “Since Wilderness Crossing is a hot topic, I’ve added it to the agenda.”

207. At that meeting, each of the Board members present discussed the Wilderness Crossing Application, the Board's consideration of the same, and other matters affecting the proposed Rezoning.

208. Each of the Board members present also specifically referenced and discussed that the Board had advertised and would be holding its public hearing on the Wilderness Crossing Application to consider the Rezoning on Tuesday, April 25, 2023.

209. During that meeting, one member of the Board, Mr. Crozier, District Supervisor for the Wilderness Crossing Land, confessed to having signed a non-disclosure agreement.

210. Thereafter, each of the attending Board members were questioned at the meeting about the non-disclosure agreements, and their relationship to the Wilderness Crossing Application and proposed Rezoning.

211. In response to the questioning, the three other Board members present stated only "no comment."

212. An affidavit by J. Bryan Nicol, averring to these allegations and showing good cause in support of this Petition's claim for relief under the Virginia Freedom of Information Act, particularly Virginia Code § 2.2-3713, is attached hereto as **Exhibit 16** and incorporated herein for the truth of the matters averred.

Board of Supervisors Grants the Wilderness Crossing Application.

213. Days after the April 13 Meeting, the first, and only, public hearing of the Board on what proved to be the largest rezoning (and the first PDM rezoning) in County history, occurred on April 25, 2023 (the "**April 25 Hearing**").

214. On the day of the hearing, the Applicant presented a revised set of proffers, dated April 24, 2023 (the "**April Proffers**"), materially revising substantial portions of the March

Proffers, as explained below. For the Court’s convenience, a copy of the April Proffers is attached separately as **Exhibit 17**.

215. Despite the outcome being to all reasonable observers a *fait accompli*, thirty-seven (37) hardy souls, including many County residents and several representatives of the CVBT, NPS, and the National Park Conservation Association, as well as the Trust and PEC, among others, rose to speak in opposition to the Wilderness Crossing Application.

216. No one rose to speak in favor.

217. All the same, at the April 25 Hearing the Board voted, 4-1, with Supervisors Lee Frame, Jim Crozier, Jim White and Mark Johnson all voting in favor, to approve the Wilderness Crossing Application and adopt the Rezoning Ordinance.

218. The Rezoning Ordinance purported to rezone the Wilderness Crossing Land, all 2,618.47 acres that bore four (4) separate zoning classifications, to one (1) zoning classification, Planned Development – Mixed Use (PDM) Conditional “subject to the Legal Summary and the proffers dated April 24, 2023, as set forth within the attachments, as presented during the Public Hearing.”

219. The Rezoning Ordinance premised its adoption upon, among other things, the materials and statements “presented during its Public Hearing” on that date. A recording of that hearing may be found at <https://orangecova.portal.civicclerk.com/event/271/media>, with proceedings on the Wilderness Crossing Application commencing at 1:33:09 and continuing through 5:16:36.

220. This Petition, challenging the Rezoning Ordinance on various legal grounds, timely followed.

* * *

**COUNT 1 - DECLARATION THAT PDM ZONING AMENDMENT, ZTA 18-05, IS
VOID AB INITIO, INVALIDATING THE REZONING ORDINANCE, AND
INJUNCTION AGAINST ANY ACTION OR OMISSION PURSUANT THERETO**

221. The Citizens reallege and incorporate the allegations of paragraphs 1–220 of this Petition as if set forth herein in their entirety.

222. Code § 15.2-2286(A) authorizes zoning ordinances to include provisions for their amendment, and provides the circumstances and process under which that amendment must occur.

223. Subsection (A)(7) of Code § 15.2-2286 provides, in pertinent part, that “[w]henver the public necessity, convenience, general welfare, or good zoning practice requires, the governing body may by ordinance amend, supplement, or change the regulations, district boundaries, or classifications of property.”

224. The pertinent portions of that subsection provide that “[a]ny such amendment may be initiated (i) by resolution of the governing body” or by “(ii) by motion of the local planning commission.” Va. Code § 15.2-2286(A)(7).

225. Additionally, it is required that “[a]ny such resolution or motion by such governing body or commission proposing the rezoning shall state the above public purposes therefor.” Va. Code § 15.2-2286(A)(7).

226. “Code § 15.2-2286(A)(7) requires that each time an amendment to the Zoning Ordinance is made, the amendment must be properly initiated.” Failure to do so will invalidate the amendment. *See, e.g., Ace Temporaries, Inc. v. City Council of the City of Alexandria*, 274 Va. 461, 467 (2007).

227. The requirement is two-fold: first, a proper initiating resolution or motion must be passed, and second, that motion or resolution must state one or more of the statutory purposes for

the amendment in the initiating resolution or motion. *See County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435, 442–43 (1991).

228. Violation of the Virginia Code in the enactment of a legislative action renders that action void *ab initio*. *See, e.g., City Council of City of Alexandria v. Potomac Greens Assocs. P'ship*, 245 Va. 371, 378 (1993).

229. The PDM Zoning Ordinance, adopting the PDM Zoning Amendment and creating the PDM zoning district, was passed in violation of both requirements.

230. No initiating motion or resolution was passed either by the Board or the Commission.

231. That being so, no initiating motion or resolution was passed stating any of the public purposes required by statute.

232. Instead, the PDM Zoning Ordinance states, and the minutes and agendas of the meetings of the Commission and the Board confirm, that “staff previously initiated” the PDM Zoning Amendment.

233. County staff are not among the entities identified by Code by whom “such amendment may be initiated.”

234. Accordingly, the PDM Zoning Ordinance was not “properly initiated” under Virginia Code, and is void *ab initio*.

235. Being void *ab initio*, the PDM Zoning Ordinance may be challenged by the Citizens now, despite the passage of more than thirty days from its adoption. *See Kole v. City of Chesapeake*, 247 Va. 51, 57 (1994); *see also Singh v. Mooney*, 261 Va. 48, 52 (2001) (holding that void *ab initio* judicial orders are “a complete nullity and it may be ‘impeached directly or

collaterally by all persons, anywhere, at any time, or in any manner.” (quoting *Barnes v. Am. Fertilizer Co.*, 144 Va. 692, 705 (1925))).

236. In short, the PDM Zoning Ordinance “is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.” *City of Richmond v. Eubank*, 179 Va. 70, 84 (1942) (quotation marks omitted).”

237. The Rezoning Ordinance, and the Wilderness Crossing Project whose development it approved, were passed pursuant to the putative authority of the PDM Zoning Ordinance.

238. Absent the PDM Zoning Ordinance, the Board lacked the authority to rezone the Wilderness Crossing Land, or any other, into the PDM zoning district.

239. Because the PDM Zoning Ordinance was void *ab initio*, the Rezoning Ordinance, approving the Rezoning of the Wilderness Crossing Land to the PDM zoning district, is also void. *See, e.g., WANV, Inc. v. Houff*, 219 Va. 57 (1978).

240. The Citizens are aggrieved by the action taken pursuant to the PDM Zoning Ordinance, namely the issuance of the Rezoning pursuant to the Rezoning Ordinance, including by the development activity to be undertaken pursuant to the Rezoning under color of the PDM Zoning Ordinance.

241. The Citizens, as landowners whose homes and lands either abut or lie in close proximity to the Wilderness Crossing Land, have a direct, immediate, pecuniary, and substantial interest in the development approved by the Rezoning Ordinance under color of the PDM Zoning Ordinance, and will suffer a harm to those interests from the advancement of the Wilderness Crossing Project, as the buildings to be built and uses undertaken pursuant to the Rezoning Ordinance will be visible from their homes and/or lands, the enjoyment of which will be burdened

by the traffic increase and disruption, noise, dust, odor, light, viewshed alterations, flooding, runoff and other environmental impacts of the decades-long construction and permanent development of the Wilderness Crossing Project.

242. The Citizens, as citizens, landowners, and taxpayers whose lands are affected by the Rezoning, are within the zone of interests that Code § 15.2-2286(A)(7) was designed to protect.

243. Because of these particularized interests, the Citizens were among the many who wrote or voiced objections to the Commission and/or the Board while the Wilderness Crossing Application was under consideration, but to no avail.

244. An actual controversy exists between the Citizens, the County and the Board with respect to whether the PDM Zoning Amendment was properly initiated and whether the PDM Zoning Ordinance, or the Rezoning Ordinance adopted pursuant thereto, are void *ab initio* or are otherwise unlawful and permit the Rezoning of the Wilderness Crossing Land.

245. This Court should adjudicate such antagonistic assertion and denial of right, review the PDM Zoning Amendment, PDM Zoning Ordinance, Rezoning Ordinance, and other relevant actions of the Commission and the Board, and declare all of the foregoing to have been adopted in contravention of Code § 15.2-2286(A)(7) and thus void *ab initio*.

246. In the alternative, the Court should declare the adoption of the PDM Zoning Amendment, PDM Zoning Ordinance, and the Rezoning Ordinance to be arbitrary and capricious, not fairly debatable, unlawful, and void.

247. In either case, this Court should enter a judgment declaring the PDM Zoning Ordinance, and the Rezoning Ordinance issued pursuant thereto, to be void and of no effect.

248. Moreover, equity will restrain actions of public officer taken under color of a law that is void *ab initio*. See, e.g., *Campbell v. Bryant*, 104 Va. 509 (1905).

249. Both the balance of the equities, and the public interest, support issuance of an injunction to protect the quiet use and enjoyment of land, which enjoys special solicitude in a court of equity.

250. Denying equitable relief would leave the Citizens subject to irreparable harm, namely the permanent disturbance of their personal and property rights, which may not be readily quantified and, as between the Citizens and the County and Board, the law gives no adequate remedy.

251. Therefore, the Court should go on to enjoin the County and the Board from taking any further action whatever in the exercise of or pursuant to the putative authority of the PDM Zoning Ordinance, as adopted through the PDM Zoning Amendment, the Rezoning Ordinance, or the Rezoning, including, but not limited to, considering any application under the PDM Zoning Ordinance, granting any right, privilege, permit or authorization pursuant to the Rezoning Ordinance, or omitting any action or the enforcement of any duty based on the putative authority of the PDM Zoning Ordinance or the Rezoning Ordinance, and should grant such other and further relief as equity may require and to justice may seem meet.

COUNT 2 – DECLARATION THAT BUILDING HEIGHT ORDINANCE, ZTA 23-03, IS VOID *AB INITIO*, INVALIDATING REZONING, AND INJUNCTION AGAINST ANY ACTION OR OMISSION PURSUANT THERETO

252. The Citizens reallege and incorporate the allegations of paragraphs 1–251 of this Petition as if set forth herein in their entirety.

253. As noted above, Code § 15.2-2286(A) authorizes zoning ordinances to include provisions for their amendment, and provides the circumstances and process under which that amendment must occur.

254. Subsection (A)(7) of Code § 15.2-2286 provides, in pertinent part, that “[w]henver the public necessity, convenience, general welfare, or good zoning practice requires, the governing body may by ordinance amend, supplement, or change the regulations, district boundaries, or classifications of property.”

255. As also previously noted, “[a]ny such amendment may be initiated (i) by resolution of the governing body,” Va. Code § 15.2-2286(A)(7), but “[a]ny such resolution . . . by such governing body . . . proposing the rezoning shall state the above public purposes therefor.” Va. Code § 15.2-2286(A)(7).

256. In short, “Code § 15.2-2286(A)(7) requires that each time an amendment to the Zoning Ordinance is made, the amendment must be properly initiated.” Failure to do so will invalidate the amendment. *See, e.g., Ace Temporaries, Inc. v. City Council of the City of Alexandria*, 274 Va. 461, 467 (2007); *County of Fairfax v. Southern Iron Works, Inc.*, 242 Va. 435, 442–43 (1991).

257. The Building Height Amendment Initiating Resolution was duly passed, but without any “state[ment of] the above public purposes therefor,” as required by Code.

258. Accordingly, the Building Height Ordinance was not “properly initiated” under Virginia Code, and is void *ab initio*.

259. Code § 15.2-2285 also imposes certain requirements on the amendment process.

260. Specifically, subsection (B) of Code § 2285 provides that “[n]o zoning ordinance shall be amended . . . unless the governing body has referred the proposed amendment . . . to the local planning commission for its recommendations,” and affords the Commission 100 days in which to act on the proposed zoning amendment unless a “shorter period [is] prescribed by the governing body.”

261. In prescribing a shorter period, “[t]he governing body,” here the Board, must “hold at least one public hearing on a proposed reduction of the commission's review period” and must “publish a notice of the public hearing in a newspaper having general circulation in the locality at least two weeks prior to the public hearing date and shall also publish the notice on the locality's website, if one exists.”

262. In this case, the Building Height Amendment Initiating Resolution prescribed a thirty (30) day period for the Commission to report on the Building Height Amendment, “shorter period” than provided by Code § 15.2-2285(B).

263. However, the Board did not “hold at least one public hearing on a proposed reduction of the commission's review period,” or “publish a notice of the public hearing in a newspaper having general circulation in the locality at least two weeks prior to the public hearing date and shall also publish the notice on the locality's website, if one exists.”

264. Violation of the Code in the enactment of a legislative action renders that action void *ab initio*. See, e.g., *City Council of City of Alexandria v. Potomac Greens Assocs. P'ship*, 245 Va. 371, 378 (1993).

265. Being void *ab initio*, the Building Height Ordinance may be challenged by the Citizens within thirty days from its adoption, as it is here, or at any time thereafter. See *Kole v. City of Chesapeake*, 247 Va. 51, 57 (1994); see also *Singh v. Mooney*, 261 Va. 48, 52 (2001) (holding that void *ab initio* judicial orders are “a complete nullity and it may be ‘impeached directly or collaterally by all persons, anywhere, at any time, or in any manner.’” (quoting *Barnes v. Am. Fertilizer Co.*, 144 Va. 692, 705 (1925))).

266. In short, the Building Height Ordinance “is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative

as though it had never been passed.” *City of Richmond v. Eubank*, 179 Va. 70, 84 (1942) (quotation marks omitted).”

267. The Rezoning Ordinance, and the Wilderness Crossing Project whose development it approved, were passed pursuant to the putative authority of the Building Height Ordinance.

268. Specifically, the Rezoning Ordinance authorized certain residential and commercial/industrial uses “to construct buildings up to 60 feet,” “certain Commercial/Industrial Uses to construct buildings up to 80 feet,” and “[e]lectric transmission, distribution and substation facilities, and towers (water or other),” but not including “telecommunication towers” to be constructed as high as the heavens. *See* Ex. 2 (Voluntary Proffer Statement II.G(5)).

269. Under the PDM Zoning Ordinance, without the Building Height Amendment, the “Maximum height” was “Forty-five (45) feet,” and the only way a higher height could be permitted was “via a Special Exception” or “a Special Use Permit for telecommunications facilities.” *See* Zoning Ordinance § 70-567(F) (2022).

270. To remove all doubt, the Zoning Ordinance provided that this requirement, contained in Section 70-567F(a), was “not eligible for removal or modification” as part of a zoning map amendment. *See* Zoning Ordinance § 70-567C(e)(2) (2022).

271. In short, under the Zoning Ordinance, without to the Building Height Amendment, the Board lacked the authority to approve a zoning map amendment to PDM, such as the Rezoning, that authorized construction of facilities in excess of the maximum height limit prescribed in Zoning Ordinance § 70-567F(a).

272. Because the Building Height Ordinance was void *ab initio*, the Rezoning Ordinance, approving the Rezoning of the Wilderness Crossing Land to authorize construction in

excess of the limits prescribed by the Zoning Ordinance, is also void. *See, e.g., WANV, Inc. v. Houff*, 219 Va. 57 (1978).

273. The Citizens are aggrieved by the action taken pursuant to the Building Height Ordinance, namely the issuance of the Rezoning pursuant to the Rezoning Ordinance, authorizing development activity not permitted to be undertaken pursuant to the unamended Zoning Ordinance.

274. The Citizens, as landowners whose homes and lands either abut or lie in close proximity to the Wilderness Crossing Land, have a direct, immediate, pecuniary, and substantial interest in the development approved by the Rezoning Ordinance under color of the PDM Zoning Ordinance, including the additional building height allowed to the Wilderness Crossing Project by the Rezoning Ordinance, approved under color of the Building Height Ordinance, and will suffer a harm to those interests from the advancement of the Wilderness Crossing Project, as the over-height buildings to be built and uses undertaken pursuant to the Rezoning Ordinance will be visible from their homes and/or lands, the enjoyment of which will be burdened by the traffic increase and disruption, noise, dust, odor, light, viewshed alterations, flooding, run-off and other environmental impacts of the decades-long construction and permanent development of the Wilderness Crossing Project.

275. The Citizens, as citizens, landowners and taxpayers whose lands are affected by the Rezoning Ordinance, are within the zone of interests that Code § 15.2-2286(A)(7) was designed to protect.

276. Because of these particularized interests, the Citizens were among those who wrote or voiced objections to the Commission and/or the Board while the Wilderness Crossing Application was under consideration, but to no avail.

277. An actual controversy exists between the Citizens, the County and the Board with respect to whether the Building Height Amendment was properly initiated and whether the Building Height Ordinance, or the Rezoning Ordinance adopted pursuant thereto, are void *ab initio* or are otherwise unlawful or permit the Rezoning of the Wilderness Crossing Land.

278. This Court should adjudicate such antagonistic assertion and denial of right, review the Building Height Amendment Initiating Resolution, Building Height Amendment, Building Height Ordinance, and Rezoning Ordinance, and declare all of the foregoing to have been adopted in contravention of Code § 15.2-2286(A)(7) and/or Code § 15.2-2285(B), and thus void *ab initio*.

279. In the alternative, the Court should declare the adoption of the Building Height Amendment Initiating Resolution, Building Height Ordinance and Rezoning Ordinance to be arbitrary and capricious, not fairly debatable, unlawful, and void.

280. In either case, this Court should enter a judgment declaring the Building Height Ordinance, and the Rezoning Ordinance issued pursuant thereto, to be void and of no effect.

281. Moreover, equity will restrain actions of public officer taken under color of a law that is void *ab initio*. See, e.g., *Campbell v. Bryant*, 104 Va. 509 (1905).

282. Both the balance of the equities, and the public interest, support issuance of an injunction to protect the quiet use and enjoyment of land, which enjoys special solicitude in a court of equity.

283. Denying equitable relief would leave the Citizens subject to irreparable harm, namely the permanent disturbance of their personal and property rights by the construction authorized by the Building Height Ordinance, under color of which the Rezoning Ordinance was passed and the Wilderness Crossing Project proceeds. Such harm may not be readily quantified and, as between the Citizens and the County and Board, the law gives no adequate remedy.

284. Therefore, the Court should go on to enjoin the County and the Board from taking any further action whatever in the exercise of or pursuant to the putative authority of the Building Height Ordinance, as adopted through the Building Height Amendment, the Rezoning Ordinance, or the Rezoning, including, but not limited to, considering any application under the Building Height Ordinance, granting any right, privilege, permit or authorization pursuant to the Rezoning Ordinance, or omitting any action or the enforcement of any duty based on the putative authority of the Building Height Ordinance or the Rezoning Ordinance, and should grant such other and further relief as equity may require and to justice may seem meet.

COUNT 3 – DECLARATION THAT THE REZONING ORDINANCE VIOLATED THE ZONING ORDINANCE BY, INTER ALIA, APPROVING INDUSTRIAL USES WITHIN PLANNED DEVELOPMENT – MIXED USE ZONING DISTRICT

285. The Citizens reallege and incorporate the allegations of paragraphs 1–284 of this Petition as if set forth herein in their entirety.

286. In the alternative, and even if the PDM Zoning Ordinance is not void *ab initio*, under Zoning Ordinance § 70-567A adopted thereby, it is plain that the “[t]he Planned Development – Mixed Use district . . . allow[s] for interrelated and compatible commercial, institutional, residential, and recreational uses within an interconnected pedestrian-oriented neighborhood.” Zoning Ordinance § 70-567A(a).

287. That provision does not identify “industrial uses” as among those allowed in the PDM zoning district.

288. No other provision of the Zoning Ordinance addressing the PDM zoning district identifies “industrial uses” as appropriate.

289. All the same, the Rezoning Ordinance approved the redevelopment of over 750 acres of the Wilderness Crossing Land for industrial uses, ranging from “limited manufacturing and processing,” to “data centers,” to “wholesale distribution or warehouse.”

290. Such uses are plainly industrial uses within the meaning of the Zoning Ordinance. *See, e.g.*, § Zoning Ordinance § 70-542 (e), (m), (v) (listing such uses as permitted in the “general industrial zoning district).

291. By approving the Rezoning Ordinance and authorizing such uses within the PDM district, the Board exceeded the authority granted by the Zoning Ordinance.

292. Additionally, the Zoning Ordinance allows the Board to “change the zoning classification of one or more properties, or part(s) thereof,” but only upon making two findings. The first is that “the public necessity, convenience, general welfare, and/or good zoning practice gives need for such action.” The second is that “of general conformance with the comprehensive plan.” *See* Zoning Ordinance § 70-191.

293. The Rezoning Ordinance contained no such finding, nor would a finding that the Rezoning was in general conformance with the Comprehensive Plan, including the Germanna-Wilderness Area Plan, be fairly debatable, but irrational and without evidence to support it.

294. Legislative actions, including rezoning decisions, taken by a legislative body in violation of its zoning ordinance are, by definition, arbitrary and capricious, not fairly debatable, and void *ab initio*. *See, e.g., Renkey v. Cty. Bd. of Arlington Cty.*, 272 Va. 369, 375–76 (2006).

295. The Citizens are aggrieved by the issuance of the Rezoning pursuant to the Rezoning Ordinance, including by authorizing industrial uses on the Wilderness Crossing Land not permitted to be undertaken pursuant to the Zoning Ordinance.

296. The Citizens, as landowners whose homes and lands either abut or lie in close proximity to the Wilderness Crossing Land, have a direct, immediate, pecuniary, and substantial interest in the development approved by the Rezoning Ordinance under color of the PDM Zoning Ordinance, including in the industrial uses allowed to the Wilderness Crossing Project by the Rezoning Ordinance, and will suffer a harm to those interests from the advancement of the Wilderness Crossing Project, as the industrial uses to be built and uses undertaken pursuant to the Rezoning Ordinance will be visible from their homes and/or lands, the enjoyment of which will be burdened by the traffic increase and disruption, noise, dust, odor, light, viewshed alterations, flooding, run-off and other environmental impacts of the decades-long construction and permanent development of the Wilderness Crossing Project.

297. For instance, the Nowacki abuts land within the Wilderness Crossing Land that are slated for such industrial uses.

298. The Nowacki Tract abuts the land slated for development as "Land Bay A" where "flex light industrial land use," specifically defined to include "limited manufacturing and processing," "data centers," and "wholesale distribution or warehouse" uses, among others, may occur.

299. Such uses would be merely hundreds of feet from the Nowacki Home. Their construction would deprive the Nowackis of the quiet enjoyment of their property, the appreciation of the forested area behind their home, and the undeveloped skyline and sunshine they have enjoyed for the last two decades. Such construction would impose on their property noise, dust, odor, run-off, light and other environmental impacts heretofore unknown, would burden the access in and around their private residence, including by construction and post-construction traffic, and would reduce the value of the Nowacki Home.

300. The Citizens, including the Nowackis, as citizens and landowners of Orange County, are within the zone of interests that Zoning Ordinance § 70-567A(a) was designed to protect.

301. Because of these particularized interests, the Citizens, including the Nowackis, were among those who wrote and voiced objections to the Commission and the Board while the Wilderness Crossing Application was under consideration, but to no avail.

302. An actual controversy exists between the Citizens, the County and the Board with respect to whether the Rezoning Ordinance, approving industrial uses within the PDM zoning district, are void *ab initio* or are otherwise unlawful or permit the Rezoning of the Wilderness Crossing Land.

303. This Court should adjudicate such antagonistic assertion and denial of right, review the Rezoning Ordinance and the Zoning Ordinance, and declare the former to have been adopted in contravention of Zoning Ordinance § 70-567A(a), and thus void *ab initio*.

304. In the alternative, the Court should declare the adoption of the Rezoning Ordinance to be arbitrary and capricious, not fairly debatable, unlawful, and void.

305. In either case, this Court should enter a judgment declaring that the PDM Zoning Ordinance does not authorize rezoning for industrial uses, and further declaring the Rezoning Ordinance approving such uses within the PDM zoning district to be in excess of the power granted the Board and, therefore, to be void *ab initio* and of no force or effect.

306. Moreover, equity will restrain actions of public officer taken under color of a law that is void *ab initio*. See, e.g., *Campbell v. Bryant*, 104 Va. 509 (1905).

307. Both the balance of the equities, and the public interest, support issuance of an injunction to protect the quiet use and enjoyment of land, which enjoys special solicitude in a court of equity.

308. Denying equitable relief would leave the Citizens subject to irreparable harm, namely the permanent disturbance of their personal and property rights by the construction of industrial uses on land abutting or in close proximity to their lands and homes, under color of an unlawful Rezoning Ordinance. Such harm may not be readily quantified and, as between the Citizens and the County and Board, the law gives no adequate remedy.

309. Therefore, the Court should go on to enjoin the County and the Board from taking any further action whatever in the exercise of or pursuant to the putative authority of the Rezoning Ordinance or the Rezoning, including, but not limited to, considering any application under the Rezoning Ordinance, granting any right, privilege, permit or authorization pursuant to the Rezoning Ordinance, or omitting any action or the enforcement of any duty based on the putative authority of the Rezoning Ordinance, and should grant such other and further relief as equity may require and to justice may seem meet.

COUNT 4 - MATERIAL CHANGE TO MARCH PROFFERS MADE DURING PUBLIC HEARING, REQUIRING SUBSEQUENT PUBLIC HEARING

310. The Citizens reallege and incorporate the allegations of paragraphs 1–309 of this Petition as if set forth herein in their entirety.

311. Under Code § 15.2-2296, localities are granted the authority to engage in conditional zoning.

312. Conditional zoning is the circumstance “whereby a zoning reclassification may be allowed subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned.” Va. Code § 15.2-2296.

313. As with all other rezoning functions, there is a process.

314. “A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, *prior to a public hearing* before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map.” Va. Code § 15.2-2297(A) (emphases added).

315. The Zoning Ordinance so provides. *See* Zoning Ordinance § 70-193.

316. The Code also allows “[t]he governing body [to] accept amended proffers once the public hearing has begun *if the amended proffers do not materially affect the overall proposal.*” Va. Code § 15.2-2297(A) (emphases added); *accord* Va. Code § 15.2-2298(A) (same); Va. Code § 15.2-2303(A).

317. Consistent with the Code, Subsection (d) of Section 70-193 of the Zoning Ordinance provides the following:

Proffers may be submitted in conjunction with an application for a zoning map amendment at any time prior to the public hearing by the board of supervisors. The applicant may amend said proffers as so desired during that timeframe. The board may, at its sole discretion, accept proffer amendments once the public hearing has begun, *provided the changes do not materially affect the proposal.* (emphases added.)

318. The April Proffers were not submitted prior to the April 25 Hearing.

319. The April Proffers were offered during that public hearing. *See* Rezoning Ordinance at 1 (making the rezoning “subject to the Legal Summary and the proffers dated April 24, 2023, as set forth within the attachments, *as presented during the Public Hearing*”) (emphases added).

320. The April Proffers amended various aspects of the March Proffers, including:

a. Increasing the cash proffers from \$6 to as much as \$24 million;

- b. Removing the limitation on use of certain of the Additional Cash Proffers to permit them to be used to fund “any . . . County capital improvement project”;
- c. Increasing the amount of permitted square footage “of industrial data center and warehouse/distribution building space” (from 5 to over 30 million square feet);
- d. Deleting various project amenities;
- e. Adding new land bays as potential sites for additional residential units;
- f. Authorizing the Developer to change the siting of uses between land bays without receiving a determination from the Zoning Administrator relating to its compliance with the GWAP;

321. These amendments and others materially affect the Rezoning proposed by the Wilderness Crossing Application and that was presented to the Commission and noticed for public hearing.

322. That being the case, the Wilderness Rezoning Application had to be readvertised under Code §§ 15.2-2204 and 15.2-2285 and an additional public hearing held for action to be taken on the proposed Rezoning. *See, e.g., Fisher v. Bd. of Supervisors*, 101 Va. Cir. 392 (Westmoreland Cty. 2012).

323. None of those steps were taken.

324. Rather, the Board, without any finding of immateriality, instead expressly approved the Rezoning Ordinance with the April Proffers.

325. Violation of the Virginia Code in the enactment of a legislative action renders that action void *ab initio*. *See, e.g., City Council of City of Alexandria v. Potomac Greens Assocs. P'ship*, 245 Va. 371, 378 (1993).

326. Additionally, legislative actions, including rezoning decisions, taken by a legislative body in violation of its zoning ordinance are, by definition, arbitrary and capricious, not fairly debatable, and void *ab initio*. See, e.g., *Renkey v. Cty. Bd. of Arlington Cty.*, 272 Va. 369, 375–76 (2006).

327. Because the Rezoning Ordinance was approved without observance of these notice and hearing requirements, it is void *ab initio* and, being void *ab initio*, may be challenged by the Citizens now or at any time thereafter. See *Kole v. City of Chesapeake*, 247 Va. 51, 57 (1994); see also *Singh v. Mooney*, 261 Va. 48, 52 (2001) (holding that void *ab initio* judicial orders are “a complete nullity and it may be ‘impeached directly or collaterally by all persons, anywhere, at any time, or in any manner.’” (quoting *Barnes v. Am. Fertilizer Co.*, 144 Va. 692, 705 (1925))).

328. In short, the Rezoning Ordinance “is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.” *City of Richmond v. Eubank*, 179 Va. 70, 84 (1942) (quotation marks omitted).”

329. The Citizens are aggrieved by the issuance of the Rezoning pursuant to the Rezoning Ordinance, including by the development activity to be undertaken pursuant to the Rezoning under color of Rezoning Ordinance.

330. The Citizens, as landowners whose homes and lands either abut or lie in close proximity to the Wilderness Crossing Land, have a direct, immediate, pecuniary, and substantial interest in the development approved by the Rezoning Ordinance under color of the PDM Zoning Ordinance, including in the revisions affected by the April Proffers, and will suffer a harm to those interests from the advancement of the Wilderness Crossing Project as approved with the April Proffers, particularly by the additional square footage of industrial data center and

warehouse/distribution building space allowed by the April Proffers may be sited near the Nowacki Home.

331. Moreover, all of the Citizens' direct, immediate, pecuniary, and substantial interests will be affected by the Wilderness Crossing Project approved by the Rezoning Ordinance under color of the PDM Zoning Ordinance, as that developments will be visible from their homes and/or lands, the enjoyment of which will be burdened by the traffic increase and disruption, noise, dust, odor, light, viewshed alterations, flooding, run-off and other environmental impacts of the decades-long construction and permanent development of the Wilderness Crossing Project.

332. The Citizens, as citizens, landowners and taxpayers, are within the zone of interests that the notice and hearing requirements of Code §§ 15.2-2297(A), 15.2-2298(A), 15.2-2303(A), and Zoning Ordinance § 70-193(d) were designed to protect.

333. Because of these particularized interests, the Citizens were among the many who wrote or voiced objections to the Commission and the Board while the Wilderness Crossing Application was under consideration, including at the April 25 Hearing, but to no avail.

334. An actual controversy exists between the Citizens, the County and the Board with respect to whether the Rezoning Ordinance, approving the April Proffers, are void *ab initio* or are otherwise unlawful or permit the Rezoning of the Wilderness Crossing Land.

335. This Court should adjudicate such antagonistic assertion and denial of right, review the March Proffers, the April Proffers, and the Rezoning Ordinance, and declare the Rezoning Ordinance, including the April Proffers, to have been adopted in contravention of Code §§ 15.2-2297(A), 15.2-2298(A), 15.2-2303(A), and/or Zoning Ordinance § 70-193(d) and thus void *ab initio*.

336. In the alternative, the Court should declare the adoption of the Rezoning Ordinance, including the April Proffers, to be arbitrary and capricious, not fairly debatable, unlawful, and void.

337. In either case, this Court should enter a judgment declaring the Rezoning Ordinance and the April Proffers approved therewith, to be void and of no effect.

338. Moreover, equity will restrain actions of public officer taken under color of a law that is void *ab initio*. See, e.g., *Campbell v. Bryant*, 104 Va. 509 (1905).

339. Both the balance of the equities, and the public interest, support issuance of an injunction to protect the quiet use and enjoyment of land, which enjoys special solicitude in a court of equity, from any actions taken pursuant to the Rezoning Ordinance or the April Proffers.

340. Denying equitable relief would leave the Citizens subject to irreparable harm, namely the permanent disturbance of their personal and property rights, which may not be readily quantified and, as between the Citizens and the County and Board, the law gives no adequate remedy.

341. Therefore, the Court should go on to enjoin the County and the Board from taking any further action whatever in the exercise of or pursuant to the putative authority of the Rezoning Ordinance or the April Proffers including, but not limited to, considering any application under the aforesaid, granting any right, privilege, permit or authorization pursuant to the aforesaid, or omitting any action or the enforcement of any duty based on the putative authority of the aforesaid, and should grant such other and further relief as equity may require and to justice may seem meet.

**COUNT 5 – DECLARATION THAT REZONING ORDINANCE AUTHORIZES
UNCONSTITUTIONAL, NONUNIFORM ASSESSMENT & TAXATION
AND IS VOID *AB INITIO*, AND AN INJUNCTION
AGAINST ANY ACT OR OMISSION PURSUANT THERETO**

342. The Citizens reallege and incorporate the allegations of paragraphs 1–341 of this Petition as if set forth herein in their entirety.

343. Under the Virginia Constitution, “[a]ll taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax” Va. Const. art. X, § 1.

344. “All assessments of real estate and tangible personal property shall be at their fair market value, to be ascertained as prescribed by law.” Va. Const. art. X, § 2.

345. Under general laws, it is the duty of “[t]he commissioner of the revenue [to] assess or reassess, as required, any lot, tract, piece or parcel of land which has been rezoned, reclassified or as to which any exception has been made, by the zoning authorities of the county.” Va. Code § 58.1-3285.

346. Assuming for purposes of argument that the Rezoning Ordinance is not void for any one of the many reasons cited above, it has the effect of reclassifying and rezoning the Wilderness Crossing Land within the meaning of Code § 58.1-3285

347. If this is so, it is now, and has been since April 25, 2023, the duty of the County to supply the commissioner of the revenue “with the necessary data and records to indicate any rezoning, reclassification, exception or improvement,” Va. Code § 58.1-3285, and the duty of the commissioner to reassess the parcels comprising the Wilderness Crossing Land, without waiting for any general reassessment.

348. The April Proffers that were a condition of the granting of the PDM rezoning putatively effected by the Rezoning Ordinance purport to relieve the County and its commissioner

of the revenue of this duty (and others) and the Developer from its equal share in the burden of real estate taxation in the County.

349. All of the April Proffers were adopted with the rest of the Rezoning Ordinance to serve a complementary purpose, were an express condition of the Rezoning, and were plainly intended to operate in tandem with one another. Put another way, had the conditions not been granted, the Rezoning would not have been approved.

350. Under the "Miscellaneous" section of the April Proffers, it provides that:

Tax Application. After rezoning approval to PDM zoning district, as provided herein, the Property will not be subject to a new tax assessment until the following occurs: (i) Applicant submits and the County approves either a recordable subdivision or final site plan, as applicable, for a particular section(s) of the Project; (ii) upon the approval of the later of either a recordable subdivision or final site plan, only those particular sections of the Project will be subject to any tax (including if any increase is due to an assessment increase) due to a change in use, and (iii) the remaining portions of the Property will continue paying taxes at the then current use and rate (whether land use or other) until a recordable subdivision or final site plan for a change in use are approved for those remaining sections of the Property.

351. In these lines the April Proffers purport to not only set aside the requirements of Code § 58.1-3285 and the constitutional commands of uniform tax assessment at fair market value pursuant to general law, but also to relieve the Wilderness Crossing Land of the next general reassessment, and also subsequent increases in the real estate tax levy by the Board, and to permit each parcel, or part thereof, to be assessed and levied on their own individualized development schedule.

352. Such an approach is contrary to the constitutional rule of uniformity and general law and foreclosed by binding Supreme Court authority. *See, e.g., Perkins v. County of Albemarle*, 214 Va. 240, 243 (1973), *adhered to in pertinent part on reh'g* 214 Va. 416, 418 (holding that "the piecemeal, segmental assessment methodology defendant has employed in implementing the

system [of real estate assessment in the County] violates the mandate of Virginia Constitution (1902) s 168 that ‘all taxes . . . shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax .’” (footnote omitted)).

353. Thus, the entire legislative act approved by the Rezoning Ordinance must fall. *See, e.g., County of Isle of Wight v. International Paper Co.*, 881 S.E.2d 776 (2022).

354. The Citizens are aggrieved by the issuance of the Rezoning pursuant to the Rezoning Ordinance, including by the relief from the general burden of real estate taxation purported to be granted to the Developers under color of the Rezoning Ordinance.

355. The Citizens, many of whom are taxpayers in the County and all of whom own homes and/or lands that either abut or lie in close proximity to the Wilderness Crossing Land, have a direct, immediate, pecuniary, and substantial interest, including as taxpayers in the Rezoning approved by the Rezoning Ordinance under color of the PDM Zoning Ordinance, including in the revisions affected by the April Proffers, and will suffer a harm to those interest by the nonuniform assessment of the Wilderness Crossing Lands, in addition to being uniquely aggrieved by Wilderness Crossing Project, whose construction and use will be visible from their homes and lands, the enjoyment of which will be burdened by the traffic disruption, noise, dust, odor, light, viewshed impact, flooding, run-off and other environmental impacts of the decades-long construction and permanent development of the Wilderness Crossing Project.

356. The Citizens, as citizens, landowners and taxpayers of Orange County, are within the zone of interests that Article X, §§ 1 and 2 of the Virginia Constitution and Code § 58.1-3285 were designed to protect.

357. Because of these particularized interests, the Citizens were among the many who wrote or voiced objections to the Commission and the Board while the Wilderness Crossing Application was under consideration, including at the April 25 Hearing, but to no avail.

358. An actual controversy exists between the Citizens, the County and the Board with respect to whether the Rezoning Ordinance, approving the April Proffers, is unconstitutional and void *ab initio* or are otherwise unlawful or permit the Rezoning of the Wilderness Crossing Land.

359. This Court should adjudicate such antagonistic assertion and denial of right, review the Rezoning Ordinance and the April Proffers that are an integral part thereof, and declare the Rezoning Ordinance, including the April Proffers, to have been adopted in contravention of Article X, §§ 1 and 2 of the Virginia Constitution, Code § 58.1-3285, and other governing Virginia law

360. In the alternative, the Court should declare the adoption of the Rezoning Ordinance, including the April Proffers, to be arbitrary and capricious, not fairly debatable, unlawful, and void.

361. In either case, this Court should enter a judgment declaring the Rezoning Ordinance and the April Proffers approved therewith, to be void and of no effect.

362. Moreover, equity will restrain actions of public officer taken under color of a law that is unconstitutional and/or void. *See, e.g., Campbell v. Bryant*, 104 Va. 509 (1905).

363. Both the balance of the equities, and the public interest, support issuance of an injunction to ensure the lawful and uniform assessment and levy of real estate taxes within the County.

364. Denying equitable relief would leave the Citizens subject to irreparable harm, namely being required to bear more than their share of the real estate tax burden of the County,

which may not be readily quantified and, as between the Citizens and the County and Board, the law gives no adequate remedy.

365. Therefore, the Court should go on to enjoin the County and the Board from taking any further action whatever in the exercise of or pursuant to the putative authority of the Rezoning Ordinance or the April Proffers including, but not limited to, the “Tax Application” provisions of the April Proffers quoted above, considering any application under the Rezoning Ordinance or the April Proffers, granting any right, privilege, permit or authorization pursuant to the aforesaid, or omitting any action or the enforcement of any duty based on the putative authority of the aforesaid, and should grant such other and further relief as equity may require and to justice may seem meet.

**COUNT 6 – DECLARATION THAT REZONING ORDINANCE VOID *AB INITIO*
**BECAUSE CONSIDERED IN VIOLATION OF VFOIA, AN INJUNCTION
**AGAINST ANY ACT OR OMISSION PURSUANT THERETO AND
WRIT OF MANDAMUS TO COMPLY WITH OPEN MEETING REQUIREMENTS******

366. The Citizens reallege and incorporate the allegations of paragraphs 1–365 of this Petition as if set forth herein in their entirety.

367. The Board has been granted all of the powers of the County. *See* Va. Code § 15.2-502(A).

368. The Board is comprised of five members and is a “public body” within the meaning of the Virginia Freedom of Information Act, Va. Code § 15.2-3700, *et seq.* *See* Va. Code § 2.2-3701 (defining “public body” to include “governing bodies of counties”).

369. Under the Virginia Freedom of Information Act (“**VFOIA**”), “every meeting shall be open to the public,” and properly noticed and conducted unless an exception applies. Va. Code § 2.2-3700(B); *see* Va. Code § 2.2-3707(A), (C), (F), (G), (H); Va. Code § 2.2-3707.2

370. VFOIA defines a “meeting” to include every gathering, whether “as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than

three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body.” Va. Code § 2.2-3701.

371. The April 13 Meeting, as it was attended by four of the five members of the Board, was a “meeting” within the meaning of the VFOIA.

372. The definitional provisions of VFOIA relating to what constitutes a “meeting” carves out those gatherings 1) “where no part of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body,” and 2) at a public forum, candidate appearance, or debate, the purpose of which is to inform the electorate and not to transact public business or to hold discussions relating to the transaction of public business, even though the performance of the members individually or collectively in the conduct of public business may be a topic of discussion or debate at such public meeting.” Va. Code § 2.2-3701.

373. Part of the purpose of the April 13 Meeting, and part of what was discussed by members of the Board, and others, at that gathering, was the Rezoning, which was a matter presently pending for action before the Board, and thus was “public business” of the Board. *See Gloss v. Wheeler*, Rec. No. 210779, 2023 WL 3513381, *9 n.8 (Va. May 18, 2023), *available at* <https://www.courts.state.va.us/opinions/opnscvwp/1210779.pdf> (holding that, given the breadth and supremacy of the Board of Supervisors in the county executive form of government “all county business is Board business”).

374. The EDPG Agenda for that April 13 Meeting included a “Wilderness Crossing Discussion.” The next item on the EDPG Agenda was “BOS and BB update by BOS and LOW,

Jim White.” Other items on the EDPG Agenda included “Planning Commission update, Wilderness Crossing . . .” *See* Ex. 16.

375. Confirming that such discussions involved “public business,” a notice of a public hearing on the Wilderness Crossing Application was given the day before, April 12, 2023. *See* Ex. 16.

376. Even if the April 13 Meeting was otherwise a public forum, candidate appearance, or debate, the purpose of the April 13 Meeting, as set by the informal agenda circulated by a member of the Board of Supervisors, was “to transact public business or to hold discussions relating to the transaction of public business,” which is what occurred.

377. The April 13 Meeting was thus a “meeting” within the meaning of VFOIA. *See Gloss v. Wheeler*, Rec. No. 210779, 2023 WL 3513381 (Va. May 18, 2023), *available at* <https://www.courts.state.va.us/opinions/opnscvwp/1210779.pdf>.

378. No exception to the requirement of an “open meeting,” or any other FOIA meeting requirement, applies to, or was properly asserted by the Board with respect to, the April 13 Meeting.

379. No public notice or advertisement was posted, much less three working days before, no agenda or agenda packets were made available for public inspection, and no minutes taken of the April 13 Meeting, all of which are required by VFOIA. *See* Va. Code § 2.2-3707(C) (notice and advertisement); Va. Code § 2.2-3707(F) (agenda); Va. Code § 2.2-3707(H) (minutes).

380. Removing any doubt that this was a knowing and willful violation of VFOIA’s open meeting requirements, each of the four Board members present at the April 13 Meeting specifically referenced and discussed the April 25 Hearing, and that the Board had advertised the same to consider the Wilderness Crossing Application and proposed Rezoning.

381. Moreover, similar violations of VFOIA's open meeting requirements had been committed by the Board.

382. By holding a meeting at which the Rezoning was considered in flagrant and knowing violation of VFOIA, the Board prevented the public from participating in the manner required by VFOIA, and so limited public participation and input, and potentially injected improper influence, free from public scrutiny, into its consideration of the Rezoning.

383. Additionally, the County wrongfully concealed various requested public records from the Commission and the public, despite formal requests from the Commission during the pendency of their review and Virginia Freedom of Information Act requests by members of the public seeking to participate in the public hearing and comment process required by the Code, all in reliance relied upon non-disclosure agreements between Board members and unnamed interests, the parties to and terms of which were also concealed.

384. These VFOIA Refusals specifically and the lack of disclosures and submittals generally constituted not only a further violation of Virginia law, as stated above, but also of the Zoning Ordinance, particularly Zoning Ordinance § 70-191.

385. That section which authorizes a rezoning only on stated bases, "whenever the public necessity, convenience, general welfare, and/or good zoning practice gives need for such action," and where "general conformance with the comprehensive plan is found," and no other, and requires "the planning commission [to] hear and provide recommendations on all zoning map amendments, and [to] consider these bases when formulating its recommendations."

386. Refusal to disclose information submitted compels the conclusion that either the information is not properly related to one of the allowed bases. Otherwise, it must be given to the Commission, so it can consider it too. In either case, the Zoning Ordinance has been violated here.

387. The April 13 Meeting and VFOIA Refusals are also a flagrant disregard of the letter and spirit of the Virginia Freedom Information Act, which instructs that “[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government.” Va. Code § 2.2-3700(B).

388. The Board’s failure to comply with VFOIA’s open meetings and public disclosure requirements in its consideration of the Rezoning renders the Rezoning Ordinance adopted by that Board void *ab initio*. See *Berry v. Bd. of Supvrs. of Fairfax Cnty.*, 884 S.E.2d 515, 531 (Va. 2023).

389. The Citizens, as residents, landowners and taxpayers of either the County or adjoining counties, who sought to participate in the Commission and/or the Board’s consideration of the Wilderness Crossing Application and Rezoning, are aggrieved by this violation of the Virginia Freedom of Information Act.

390. Moreover, the Citizens, as landowners whose homes and lands either abut or lie in close proximity to the Wilderness Crossing Land, have a direct, immediate, pecuniary, and substantial interest in the development approved by the Rezoning which was considered by the Board at a meeting held in flagrant violation of VFOIA, and will suffer a harm to those interests from the Rezoning, approving the Wilderness Crossing Project, as the buildings to be built and uses undertaken pursuant to the Rezoning will be visible from their homes and/or lands, the enjoyment of which will be burdened by the traffic increase and disruption, noise, dust, odor, light, viewshed alterations, flooding, run-off and other environmental impacts of the decades-long construction and permanent development of the Wilderness Crossing Project.

391. The Citizens, as citizens of the Commonwealth, landowners, and taxpayers whose lands are affected by the Rezoning, are within the zone of interests that the VFOIA's open meetings requirements were designed to protect.

392. Because of these particularized interests, the Citizens were among the many who wrote or voiced objections to the Commission and the Board while the Wilderness Crossing Application was under consideration, including at the April 25 Hearing, but to no avail.

393. An actual controversy exists between the Citizens, the County and the Board with respect to whether the Rezoning Ordinance, approving the Rezoning, was adopted in violation of VFOIA and is void *ab initio* or are otherwise unlawful or permits the Rezoning of the Wilderness Crossing Land.

394. This Court should adjudicate such antagonistic assertion and denial of right, review the EDPG Agenda, the April 12 Notice, and such other further evidence that may be necessary to a determination of the facts bearing on said controversy, and declare the Rezoning Ordinance to have been adopted in contravention of VFOIA.

395. In the alternative, the Court should declare the adoption of the Rezoning Ordinance to be arbitrary and capricious, not fairly debatable, unlawful, and void.

396. In either case, this Court should enter a judgment declaring the Rezoning Ordinance to be void and of no effect.

397. Moreover, equity will restrain actions of public officer taken under color of a law that is void. *See, e.g., Campbell v. Bryant*, 104 Va. 509 (1905).

398. Both the balance of the equities, and the public interest, support issuance of an injunction to protect the quiet use and enjoyment of land, which enjoys special solicitude in a court of equity, and which is threatened by the Rezoning considered in violation of the VFOIA.

399. Denying equitable relief would leave the Citizens subject to irreparable harm, namely the permanent disturbance of their personal and property rights, which may not be readily quantified and, as between the Citizens and the Board, the law gives no fully adequate remedy for such a violation of VFOIA in the consideration of public business, such as the Rezoning.

400. Therefore, the Court should go on to mandate compliance with the open meeting requirements of VFOIA by the Board, and enjoin the County and the Board from taking any further action whatever in the exercise of or pursuant to the putative authority of the Rezoning Ordinance, considering any application under the Rezoning Ordinance, granting any right, privilege, permit or authorization pursuant to the aforesaid, or omitting any action or the enforcement of any duty based on the putative authority of the aforesaid, and should grant such other and further relief as equity may require and to justice may seem meet.

COUNT 7 – DECLARATION THAT REZONING ORDINANCE VOID BECAUSE LACKING SUBMITTALS & FINDINGS REQUIRED BY ZONING ORDINANCE AND AN INJUNCTION AGAINST ANY ACT OR OMISSION PURSUANT THERETO

401. The Citizens reallege and incorporate the allegations of paragraphs 1–400 of this Petition as if set forth herein in their entirety.

402. Under the Zoning Ordinance, a zoning map amendment may be proved and rezoning of real estate granted on application that provides certain information.

403. Zoning Ordinance Section 70-145(a), made applicable to the Rezoning by Zoning Ordinance Section 70-194, requires, in pertinent part, that the Applicant submit, among other items: “[a] general concept plan,” “which clearly shows all existing conditions and proposed changes to the property that will result from the [Wilderness Crossing A]pplication.”

404. These include, among other requirements, a detailed depiction of:

- a. “Proposed structures and/or uses and their orientation on the property;

- b. Proposed utilities;
- c. Proposed grading;” and
- d. “General parking and landscaping areas.” Zoning Ordinance § 70-145(a)(2).

405. These submittals were either wholly missing, all of the above with the exception of some planning regarding water and wastewater, but none for electricity, lacking any analysis of acknowledged conditions, particularly the water and wastewater analysis, and/or woefully inadequate in light of revisions to the Wilderness Crossing Project made by the Applicant over the life of the Wilderness Crossing Application, including in the April Proffers, which deficiency applies to all of the above.

406. Additionally, the Zoning Ordinance requires that “[a] written narrative describing the scope of the proposal” be submitted and “include[e] at a minimum,” and among other items:

- a. “Anticipated traffic volumes and related traffic impacts;
- b. A fiscal impact analysis including expected economic benefits and costs to the county;
- c. Impacts on the provision of public services;
- d. An environmental impact analysis;
- e. An analysis of impacts on historic and cultural resources; and
- f. Anticipated impacts to neighboring properties and how those impacts will be mitigated.” Zoning Ordinance § 70-145(a)(3).

407. These submittals were either wholly missing, as in the case of the “analysis of impacts on historic and cultural resources” and of “anticipated impacts to neighboring properties and how those impacts will be mitigated,” lacking any analysis of acknowledged conditions, such

as the failure to “assess” the Wilderness Crossing Land “for contamination related to the Mines (a failure acknowledged in the Voluntary Proffer Statement) or to evaluate impacts on neighboring jurisdictions in the TIA, and/or woefully inadequate in light of revisions made by the Applicant to the Wilderness Crossing Project over the life of the Wilderness Crossing Application, which deficiency applies to all of the above, particularly in light of the April Proffers removal of the limitation on “industrial data center and warehouse/distribution building space.”

408. Under Section 70-145 of the Zoning Ordinance, it plainly provides that “[a]n application that provides all of the required information, in appropriate detail, shall be determined to be complete and be accepted for review.” Zoning Ordinance § 70-145(b).

409. Conversely, “[a]n application omitting any required information shall be deemed to be incomplete and shall not be accepted, unless the zoning administrator determines the missing information is not required to adequately review the application.”

410. On information and belief, the Zoning Administrator for the County made no such determination with respect to the Wilderness Crossing Application.

411. In the alternative, any such determination with respect to the Wilderness Crossing Application would be arbitrary and capricious, not fairly debatable, and therefore unlawful and void.

412. By approving the Rezoning Ordinance without insisting that the Wilderness Crossing Application satisfy these requirements, the County and the Board exceeded the authority granted by the Zoning Ordinance.

413. Additionally, the Zoning Ordinance allows the Board to “change the zoning classification of one or more properties, or part(s) thereof,” but only upon making two findings. The first is that “the public necessity, convenience, general welfare, and/or good zoning practice

gives need for such action.” The second is that “of general conformance with the comprehensive plan.” *See* Zoning Ordinance § 70-191.

414. The Rezoning Ordinance contained no such finding, nor would a finding that the Rezoning was in general conformance with the Comprehensive Plan, including the Germanna-Wilderness Area Plan, be fairly debatable, but arbitrary and capricious, and therefore unlawful and void.

415. Legislative actions, including rezoning decisions, taken by a legislative body in violation of its zoning ordinance are, by definition, arbitrary and capricious, not fairly debatable, and void *ab initio*. *See, e.g., Renkey v. Cty. Bd. of Arlington Cty.*, 272 Va. 369, 375–76 (2006).

416. Because the Rezoning Ordinance was approved without observance of these notice and hearing requirements, it is void *ab initio* and, being void *ab initio*, may be challenged by the Citizens now or at any time thereafter. *See Kole v. City of Chesapeake*, 247 Va. 51, 57 (1994); *see also Singh v. Mooney*, 261 Va. 48, 52 (2001) (holding that void *ab initio* judicial orders are “a complete nullity and it may be ‘impeached directly or collaterally by all persons, anywhere, at any time, or in any manner.’” (quoting *Barnes v. Am. Fertilizer Co.*, 144 Va. 692, 705 (1925))).

417. In short, the Rezoning Ordinance “is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.” *City of Richmond v. Eubank*, 179 Va. 70, 84 (1942) (quotation marks omitted).”

418. The Citizens are aggrieved by the approval of the Rezoning pursuant to the Rezoning Ordinance without the submittals and findings required by the Zoning Ordinance.

419. The Citizens, as landowners whose homes and lands either abut or lie in close proximity to the Wilderness Crossing Land, have a direct, immediate, pecuniary, and substantial

interest in the development approved by the Rezoning Ordinance under color of the Zoning Ordinance, and will suffer a harm to those interests from the advancement of the Wilderness Crossing Project as approved by the Rezoning Ordinance, as the buildings to be constructed and the uses to be conducted pursuant thereto will be visible from their homes and/or lands, the enjoyment of which will be burdened by the traffic increase and disruption, noise, dust, odor, light, viewshed alterations, flooding, run-off and other environmental impacts of the decades-long construction and permanent development of the Wilderness Crossing Project.

420. The Citizens, as citizens, landowners and taxpayers, are within the zone of interests that the above-mentioned submittal and conformance requirements of Zoning Ordinance §§ 70-145, -191, and -194 were designed to protect.

421. Because of these particularized interests, the Citizens were among the many who wrote or voiced objections to the Commission and the Board while the Wilderness Crossing Application was under consideration, including at the April 25 Hearing, but to no avail.

422. An actual controversy exists between the Citizens, the County and the Board with respect to whether the decision to adopt the Rezoning Ordinance, was arbitrary and capricious, not fairly debatable, and void *ab initio*.

423. This Court should adjudicate such antagonistic assertion and denial of right, review the Wilderness Crossing Application and the Rezoning Ordinance, and declare the Rezoning Ordinance to have been adopted in contravention of Zoning Ordinance §§ 70-145, -191, and -194, and such adoption thus to have been, by definition, arbitrary and capricious, not fairly debatable, and void *ab initio*. In the alternative, the Court should declare the adoption of the Rezoning Ordinance, including the April Proffers, to be arbitrary and capricious, not fairly debatable, unlawful, and void.

424. In either case, this Court should enter a judgment declaring the Rezoning Ordinance to be void and of no effect.

425. Moreover, equity will restrain actions of public officer taken under color of a law that is void *ab initio*. See, e.g., *Campbell v. Bryant*, 104 Va. 509 (1905).

426. Both the balance of the equities, and the public interest, support issuance of an injunction to protect the quiet use and enjoyment of land, which enjoys special solicitude in a court of equity, from any actions taken pursuant to the Rezoning Ordinance improperly adopted.

427. Denying equitable relief would leave the Citizens subject to irreparable harm, namely the permanent disturbance of their personal and property rights, which may not be readily quantified and, as between the Citizens and the County and Board, the law gives no adequate remedy.

428. Therefore, the Court should go on to enjoin the County and the Board from taking any further action whatever in the exercise of or pursuant to the putative authority of the Rezoning Ordinance including, but not limited to, considering any application under the aforesaid, granting any right, privilege, permit or authorization pursuant to the aforesaid, or omitting any action or the enforcement of any duty based on the putative authority of the aforesaid, and should grant such other and further relief as equity may require and to justice may seem meet.

PRAYER FOR RELIEF

WHEREFORE, the Citizens pray that the Court:

- 1) Grant the Petition in favor of the Citizens and against the County and the Board;
- 2) Find for the Citizens on Counts 1 through 7;
- 3) Enter a declaratory judgment in their favor, declaring the PDM Zoning Ordinance, and thus the Rezoning Ordinance issued pursuant thereto, to be void *ab initio* and of no force or effect;
- 4) Enter a declaratory judgment in their favor, declaring the Building Height Ordinance, and thus the Rezoning Ordinance issued pursuant thereto, to be void *ab initio* and of no force or effect;
- 5) Enter a declaratory judgment in their favor, declaring that the PDM Zoning Ordinance does not authorize rezoning for industrial uses, and thus declaring the Rezoning Ordinance approving such uses within the PDM zoning district to be in excess of the power granted the Board and so void *ab initio* and of no force or effect;
- 6) Enter a declaratory judgment in their favor, declaring that the Rezoning Ordinance was adopted without observance of the requirement that changes made during the public hearing that “materially affect” the proposed Rezoning be noticed for a subsequent hearing prior to a vote, in violation of Code §§ 15.2-2297(A), 15.2-2298(A), 15.2-2303(A), and Zoning Ordinance § 70-193(d), and so declaring the Rezoning Ordinance adopted without the requisite procedure to be void *ab initio* and of no force or effect;
- 7) Enter a declaratory judgment in their favor, declaring that the Rezoning Ordinance

violated Article X, §§ 1 and 2 of the Virginia Constitution and Code § 58.1-3285, by unconstitutionally and unlawfully relieving the Developer of its equal share of the burden of real estate taxation in the County, thereby rendering the Rezoning Ordinance void *ab initio* and of no force or effect;

- 8) Enter a declaratory judgment in their favor, declaring that the Rezoning Ordinance was considered and adopted by the Board in contravention of VFOIA's open meetings requirements, thereby rendering the Rezoning Ordinance adopted by that Board void *ab initio* and of no force or effect, and granting a petition for writ of mandamus, compelling the County and the Board to observe VFOIA's open meeting requirements when considering any future proposed rezoning of land in the Germanna-Wilderness Area, including, but not limited to the Wilderness Crossing Land;
- 9) Enter a declaratory judgment in their favor, declaring that the Rezoning Ordinance was adopted in contravention of the Zoning Ordinance, particularly the above-mentioned submittal and conformance requirements of Zoning Ordinance §§ 70-145, -191, and -194, thereby rendering the Rezoning Ordinance, by definition, arbitrary and capricious, not fairly debatable, and void *ab initio*;
- 10) Enter an injunction against the County and the Board taking any further action whatever in the exercise of or pursuant to the putative authority of the PDM Zoning Ordinance, the Building Height Ordinance, or the Rezoning Ordinance, including, but not limited to, considering any application under the PDM Zoning Ordinance, the Building Height Ordinance, or the Rezoning Ordinance granting any right, privilege, permit or authorization pursuant to the aforesaid ordinances, omitting any

action or the enforcement of any duty based on the putative authority of the aforesaid ordinances, or contracting any obligation or spending any money pursuant thereto;

- 11) Award the Citizens their reasonable costs, including costs and fees for expert witnesses and attorney fees, incurred in prosecuting the Petition, in accordance with Code § 2.2-3713(D) and County Code § 70-95; and
- 12) Grant to the Citizens such other and further relief as justice may require and to equity may seem meet.

Dated: May 24, 2023

Respectfully submitted,



By Counsel

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