V I R G I N I A:

IN THE CIRCUIT COURT FOR THE COUNTY OF CHESTERFIELD

DUANE BRANKLEY,

GLEN BESA,

and

ALIYA FAROOQ,

Petitioners;

v.

ANDREW G. GILLIES, in his official capacity as Zoning Administrator of Chesterfield County,

Serve: Andrew G. Gillies, Planning Director
9800 Government Center Parkway
Chesterfield, Virginia 23832

Jeffrey L. Mincks, County Attorney
9901 Lori Road — Room No. 503
Chesterfield, Virginia 23832

VIRGINIA ELECTRIC & POWER COMPANY,

Serve: CT Corporation System, Registered Agent
4701 Cox Road – Suite No. 285
Glen Allen, Virginia 23060-6808

CHESTERFIELD COUNTY BOARD OF ZONING APPEALS,

Serve: Chair, Board of Zoning Appeals
9800 Government Center Parkway
Chesterfield, Virginia 23832

Respondents.

Case No. _____

PETITION FOR DECLARATORY JUDGMENT OR,
IN THE ALTERNATIVE, WRIT OF MANDAMUS

Three residents of Chesterfield County ask this Court to resolve a dispute over the zoning requirements for a new power plant proposed by Virginia Electric and Power Company

(Dominion). According to Dominion, the proposed plant does not need the conditional use permit generally required of all new power plants because Dominion already holds a permit for a separate power plant it operates elsewhere on the same 200-acre property at issue. That is not the law in Chesterfield County, nor anywhere else in the Commonwealth. But when the residents asked County Zoning Administrator Andrew Gillies to declare as much, he declined to provide a definitive answer and then refused to process the residents' timely appeal to the County's Board of Zoning Appeals (the Board).

Having exhausted all avenues for administrative resolution, Chesterfield County residents Duane Brankley, Glen Besa, and Aliya Farooq (collectively, the Residents) now ask this Court for a declaratory judgment answering the same straightforward question of Virginia law that County officials have so far refused to hear. In the alternative, the Residents ask this Court to issue a writ of mandamus directing Mr. Gillies and/or the Board to docket either the Residents' November 18, 2024 appeal or their June 24, 2024 appeal in accordance with Virginia law.

THE PARTIES

Petitioner Duane Brankley

1. Duane Brankley is a citizen of Chesterfield County who resides in a home he owns at [redacted] North Chesterfield, Virginia 23237.

2. Mr. Brankley's home is approximately 1.5 miles west of Dominion's property at 500 Coxendale Road.

3. Mr. Brankley's home is in close enough proximity to the Coxendale Road property that his house was continuously covered in coal dust from the coal-fired units that Dominion previously operated on the site. The dust required that Mr. Brankley frequently power-wash his home and walkway, along with the home across the street in which his late mother lived.

Petitioner Glen Besa

4. Glen Besa is a citizen of Chesterfield County who resides in a home owned in his wife's name at [redacted] North Chesterfield, Virginia 23234.

5. Mr. Besa's home is approximately 6.35 miles northwest of Dominion's property at 500 Coxendale Road.

6. Mr. Besa suffers from asthma, a condition that is aggravated by exposure to air pollutants like ozone, nitrogen oxides, carbon monoxide, particulate matter, volatile organic compounds, and sulfur dioxide.

7. In addition to living near Dominion's property at 500 Coxendale Road, Mr. Besa also recreates in areas adjacent to that property. He has visited and hiked the nearby Dutch Gap Conservation Area, and he accesses the James River for paddling at the public boat ramp on and directly adjacent to the property.

Petitioner Aliya Farooq

8. Aliya Farooq is a citizen of Chesterfield County who resides with her husband in a home they own at [redacted] Chester, Virginia 23237.

9. Ms. Farooq's home is approximately 2 miles southeast of Dominion's property at 500 Coxendale Road.

Respondent Andrew G. Gillies

10. Andrew G. Gillies is the Chesterfield County Director of Planning. In that role, Mr. Gillies serves as the statutory zoning administrator for Chesterfield County. *See* Virginia Code § 15.2-2286(A)(4) (allowing zoning ordinances to provide for "the appointment or designation of a zoning administrator" with "all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance"); Chesterfield County Code § 19.1-6(A)(2) (providing that the "director of planning shall administer and enforce conditions of zoning").

11. Under Virginia Code § 15.2-2286(A)(4), Mr. Gillies is required to "respond within 90 days of a request for a decision or determination on zoning matters within the scope of his authority unless the requester has agreed to a longer period."

12. According to the Chesterfield County Attorney's Office, Mr. Gillies and his staff also decide whether to docket appeals to the Board of Zoning Appeals challenging his determinations.

Respondent Virginia Electric & Power Company

13. Virginia Electric and Power Company, doing business as Dominion Energy Virginia (Dominion), is a stock corporation organized under Virginia law. Dominion is the exclusive provider of electricity throughout its certificated service territory.

14. In addition to distributing electricity to customers, Dominion owns a fleet of power plants that generate electricity for the PJM Interconnection, a regional grid that serves Virginia and all or part of twelve other states and the District of Columbia.

15. Separately and in addition to approval by the State Corporation Commission under Code § 56-265.2:1, Virginia law requires that Dominion satisfy all applicable land use regulations before constructing a new power plant. *Cf*. Virginia Code § 56-265.2:1 (preempting local zoning regulation only in cases where the Commission approves a "pipeline for the transmission or distribution of manufactured or natural gas").

Respondent Chesterfield County Board of Zoning Appeals

16. The Chesterfield County Board of Zoning Appeals (the Board) is a local body organized under Virginia Code § 15.2-2308.

17. The Board has a statutory duty under Virginia Code § 15.2-2309(1) to "hear and decide appeals from any order, requirement, decision, or determination made by an administrative officer in the administration or enforcement" of the County's Zoning Ordinance.

18. According to the Chesterfield County Attorney's Office, the County's Director of Planning and his staff decide whether to place a case on the Board's docket.

19. To the extent the requested writ lies against Mr. Gillies rather than the Board, the Board nonetheless remains "an indispensable party to [a] mandamus action" requesting the docketing of an appeal under Virginia Code § 15.2-2311. *See Chilton-Belloni v. Angle ex rel. City of Staunton*, 294 Va. 328, 334 (2017).

JURISDICTION & VENUE

20. Under the Virginia Declaratory Judgment Act, Virginia Code §§ 8.01-184 – 8.01-191, the Court has jurisdiction to "make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed" and to enter declaratory judgments on "[c]ontroversies involving the interpretation of . . . municipal ordinances and other governmental regulations," *id.* § 8.01-184. In so doing, the Court may grant "[f]urther relief based on a declaratory judgment . . . whenever necessary or proper," *id.* § 8.01-186—including "ancillary injunctive relief in aid of . . . a declaration that [an] action taken by [a locality] was invalid," *Chacheris v. Alexandria City Council*, 103 Va. Cir. 30 (Alexandria 2019).

21. The Court has jurisdiction under Virginia Code § 17.1-513 "to issue writs of mandamus . . . to all inferior tribunals created or existing under the laws of the Commonwealth" and in other cases "in which mandamus may issue according to the principles of common law." Upon a petition for mandamus, the Court must "award or deny the writ according to the law and facts of the case." Virginia Code § 8.01-648.

22. This petition satisfies the requirements of Virginia Code § 8.01-644 because it is verified and because the general timeline for a responsive pleading under Supreme Court of Virginia Rule 3:8 provides Mr. Gillies and the Board with notice and an opportunity to respond within "a reasonable time before" any writ would issue. *See Hutchins v. Carrillo*, 27 Va. App. 595, 609 (1998) (describing notice requirement in Virginia Code § 8.01-644 as a "procedural requirement[ ] for *obtaining*" mandamus relief) (emphasis added); *see also Harris v. Director of Virginia Department of Corrections*, 282 F. App'x 239, 243 (4th Cir. 2008) (per

curiam) (holding that service of petition under § 8.01-644 is a "condition to obtaining relief" rather than a "condition to filing") (citing *Hutchins*, 27 Va. App. at 609).

23. Both declaratory and mandamus relief may be accompanied by an award of costs if "proper and just in view of the particular circumstances of the case." Virginia Code §§ 8.01-190, 8.01-648.

24. Venue in this Court is also proper under Virginia Code §§ 8.01-185 and 8.01-262(1)–(3) because Mr. Gillies and the Board maintain their offices within Chesterfield County and Dominion "regularly conducts substantial business activity" within Chesterfield County.

25. Venue in this Court is also proper under Virginia Code § 8.01-261(5) because granting the Residents' request for a writ of mandamus would result in proceedings within Chesterfield County.

FACTUAL BACKGROUND

The Proposed Chesterfield Energy Reliability Center

26. Dominion plans to build a new power plant, which it refers to as the "Chesterfield Energy Reliability Center" (the Proposed Plant or CERC), in Chesterfield County, Virginia.

27. As described in filings with the Chesterfield County Planning Department and the Virginia Department of Environmental Quality (DEQ), the Proposed Plant will have a capacity of approximately 1,000 megawatts and will be fueled by natural gas and fuel oil. Dominion has also stated that turbines at the Proposed Plant will be capable of burning "an advanced gaseous fuel blend" that includes hydrogen.

28. Because the Proposed Plant will be a major source of air pollution, the Virginia Air Pollution Control Law requires that Dominion obtain a pre-construction air pollution permit from DEQ.

29. In its air permit application, Dominion estimates that the Proposed Plant will annually emit into the air of Chesterfield County up to 291 tons of nitrogen oxides (NO_x), 774 tons of carbon monoxide (CO), 150 tons of particulate matter (PM), 134 tons of volatile organic compounds (VOCs), 27 tons of sulfur dioxide (SO_2), and 18 tons of sulfuric acid mist (H_2SO_4).

30. Dominion also estimates that the Proposed Plant has the potential to annually emit more than 13 tons of hazardous air pollutants (HAPs) known or suspected to cause cancer, as well as the potential to emit the equivalent of more than 2 million tons of carbon dioxide (CO_2) in greenhouse gases each year.

The Coxendale Road Property

31. Although Dominion initially proposed to construct the Proposed Plant along Battery Brook Parkway in the James River Industrial Center, it has now publicly announced plans to build the facility on a parcel located at 500 Coxendale Road in Chester, Virginia (the Coxendale Road Property).

32. Since the 1950s, Dominion has operated another power plant, the Chesterfield Power Station (the Existing Plant), on the Coxendale Road Property. Dominion currently operates two gas-fired electric generation units at the Existing Station, but the facility historically included coal-fired units as well.

33. The two gas-fired electric generation units operating at the Existing Station are combined-cycle units, which are technologically and operationally distinct from the simple-cycle units Dominion has proposed for the Proposed Plant.

34. The Coxendale Road Property is zoned Heavy Industrial (I-3) under the Chesterfield County Zoning Ordinance (the Ordinance).

35. Under the Ordinance, an "electric power plant producing electricity for others" is a conditional use on properties in an I-3 district. See Chesterfield Code Table 19.1-52.A.

36. A "conditional use" under the Ordinance is a form of "special exception" under Virginia's zoning enabling law. *See* Virginia Code § 15.2-2201 (defining a "special exception" as a "special use that is a use not permitted in a particular district except by a special use permit granted under the provisions of [the zoning enabling law] and any zoning ordinances adopted" thereunder); *see also* Greg Kamptner, Albemarle County Land Use Law Handbook § 12-100 (March 2022), available at https://bit.ly/3zcbMSd ("Special exceptions are also known as special use permits or conditional use permits"). "Both terms refer to the delegated power of the state to set aside certain categories of uses which are to be permitted only after being submitted to governmental scrutiny in each case, in order to insure compliance with standards designed to protect neighboring properties and the public." *Fairfax County Board of Supervisors v. Southland Corp.*, 224 Va. 514, 521 (1982) (citing 3 Robert M. Anderson, American Law of Zoning 2d § 19.01 (2d ed. 1977); 1 Arden H. Rathkopf, Law of Zoning & Planning § 12.06 (4th ed. 1982)).

37. When Dominion constructed the Existing Plant more than 70 years ago, the facility qualified as a by-right use and thus did not require a special exception. Some time after the County amended its Ordinance to designate electric generation facilities as a conditional use in the County's industrial districts, Dominion applied in 1989 for a conditional use permit to add two additional generation units to the Existing Plant. The Board of Supervisors approved that request on February 28, 1990, under Case No. 89SN0412.

38. The Board of Supervisors approved additional requests to expand the Existing Plant's conditional use approval in 1990 under Case No. 90SN0283 and again in 1991 under Case No. 90SN0307.

39. In 2010, Dominion submitted an application under Case No. 10SN0114 to expand its conditional use approval to allow on-site disposal of solid waste generated at the Existing Plant and other plants in Dominion's fleet, as well as to "consolidate all properties related to the station under one (1) set of zoning guidelines."

40. On February 24, 2010, the County Board of Supervisors approved Dominion's conditional use permit request. As approved, Condition 1 of the conditional use permit provides:

    1. Uses. Uses permitted on the Property shall be:
        A. Any use permitted in the Heavy Industrial (I-3) District.
        B. Electric power generation plant.
        C. Management facility for fossil fuel combustion products ('FFCPs') . . .
        D. Ponds or other storage facilities for FFCPs.
        E. Haul road or other manners of transport of FFCPs.
        F. Reclamation of FFCPs.
        G. Any accessory uses associated with any of the uses listed above.

41. The Board of Supervisors approved additional amendments to Dominion's conditional use permit on March 9, 2016, in Case No. 15SN0647 and on February 24, 2021, in Case No. 19SN0554. Both amendments sought to address changes to state and federal regulations for the handling of fossil fuel combustion products.

Dominion Asserts a Right Under the Existing Plant's Permit

42. Because the Proposed Plant would be a major source of air pollution under the federal Clean Air Act and the Virginia Air Pollution Control Law, Dominion must obtain a permit for the facility under 42 U.S.C. § 7475 and 9 VAC § 5-80-1625. Accordingly, Dominion submitted an application for an air pollution permit to DEQ on August 1, 2023.

43. On August 30, 2023, DEQ advised Dominion that its application was incomplete because it failed to include certification under Virginia Code § 10.1-1321.1 from the local governing body that "the location and operation of the [Proposed Plant] are consistent with all ordinances adopted pursuant" to Virginia's zoning enabling law.

44. On March 15, 2024, Dominion submitted a request to the County's Planning Department for a written determination regarding that Property's zoning status.

45. The materials Dominion submitted in support of its determination request did not describe or mention the Proposed Plant. Instead, the materials asked for confirmation that the "*current* use of the [Coxendale Road] Property complies with all applicable zoning laws and ordinances" (emphasis added). At the time Dominion submitted its request for a zoning determination, it had an application pending before the Planning Department for

conditional use approval to operate the Proposed Plant on a different parcel, located along the Battery Brooke Parkway.

46. Mr. Gillies responded to Dominion's request by letter dated April 5, 2024, confirming: (a) that the Coxendale Road Property is zoned Heavy Industrial (I-3); (b) that the Property is subject to conditions imposed in the prior zoning cases identified above in paragraphs 37–38; (c) that the Board of Supervisors previously granted Dominion a conditional use permit for an "electric power generation plant" in connection with the Existing Plant; and (d) that any development of those properties is "subject to obtaining site plan approval and building permit." The letter closed by noting that the conclusions therein were expressly

> based on the *facts and information* [Dominion] *provided* along with current adopted ordinances, regulations and requirements in effect as of the date of this letter. Additional facts or changed circumstances and/or future amendments or revisions to adopted ordinances, regulations or requirements may cause the statements made herein to no longer be accurate and subject to modification.

(Emphasis added).

47. Like the materials Dominion submitted in support of its request, Mr. Gillies's April 5, 2024 letter made no mention of the Proposed Plant.

48. Dominion publicly announced its plans to relocate the Proposed Plant to the Coxendale Road Property by letter dated May 1, 2024—nearly a month after Mr. Gillies responded to Dominion's request that he determine that "the current use of th[at] Property complies with all applicable zoning laws and ordinances."

49. Also on May 1, 2024, Dominion requested that Chesterfield County certify under Virginia Code § 10.1-1321.1 that the Proposed Plant was consistent with all applicable zoning

ordinances. In support of its request, Dominion attached Mr. Gillies's April 5, 2024 letter regarding the Existing Plant. Dominion claimed in its request for certification that Mr. Gillies's letter "confirms" that the Proposed Plant "is a permitted use under the local zoning requirements."

50. On May 24, 2024, Deputy County Administrator Jesse W. Smith signed the Local Governing Body Certification Form, certifying that "[t]he proposed facility is fully consistent with all applicable local ordinances."

51. In an abundance of caution that Mr. Smith's certification may represent an appealable zoning decision under Virginia Code § 15.2-2311, the Residents filed a Notice of Appeal with the Board on June 24, 2024, seeking review of Mr. Smith's certification or a determination that it was beyond the Board's appellate jurisdiction because it was not, in fact, a decision made in the administration of the local zoning ordinance. On July 8, 2024, the County Attorney's Office, on behalf of Mr. Gillies, confirmed to both the Residents and Dominion that Mr. Smith's determination was not subject to the Board's appellate jurisdiction because it was not "made . . . 'in the administration or enforcement of'" Virginia's zoning enactment law or any ordinance adopted thereunder.

52. On August 20, 2024, Dominion submitted a revised permit application to DEQ, advising the agency that it had relocated the Proposed Plant to the Coxendale Road Property. Dominion attached to its revised application a copy of the May 24, 2024 Local Governing Body Certification Form.

53. Dominion submitted additional materials in support of its air permit application on September 26, 2024. Those materials included a copy of Mr. Gillies's April 5, 2024 letter and a statement by Dominion that the letter "provided confirmation that CERC is in keeping with permitted site usage."

54. On October 23, 2024, DEQ advised Dominion that its "permit application contains sufficient information to continue the application process."

The Residents Request a Zoning Determination

55. Virginia's zoning enabling law provides that a local "zoning administrator shall respond within 90 days of a request for a decision or determination on zoning matters within the scope of his authority." Virginia Code § 15.2-2286(A)(4). Similarly, the County's Zoning Ordinance provides that "[t]he director of planning shall provide a written response to a person who has filed a request in writing for a decision or determination on zoning matters within the scope of his authority." Chesterfield Code § 19.1-5(A).

56. After confirming with the County Attorney Office and Planning Department that the completed Local Governing Body Certification Form did not constitute "a decision or determination made by an[ ] administrative officer in the administration or enforcement of" the County's Zoning Ordinance subject to appeal under Virginia Code § 15.2-2311, the Residents submitted a written request on July 24, 2024 for a determination by Mr. Gillies under Virginia Code § 15.2-2286(A)(4) and Chesterfield Code § 19.1-5(A).

57. Specifically, the Residents' July 24, 2024 request sought Mr. Gillies's confirmation that:

(1) the property on which Dominion's existing Chesterfield Power Station operates at 500 Coxendale Road is zoned Heavy Industrial (I-3) under the Zoning Ordinance;

(2) the proposed CERC falls within the use category of "electric power plant producing electricity for others" in the Chesterfield County Zoning Ordinance (the Zoning Ordinance), thus requiring a conditional use permit from the County Board of Supervisors (the Board) before commencing construction if built on the site of the existing Chesterfield Power Station or any other property zoned Heavy Industrial (I-3); and

(3) the conditional use approval regarding the existing Chesterfield Power Station granted to Dominion in prior zoning cases does not cover the proposed CERC.

58. In support of their request, the Residents provided specific details about the Proposed Plant documented by Dominion in official filings before state and local authorities and explained how they would be affected by the Proposed Plant and by being deprived of an opportunity to participate in the conditional use permitting process. Their request also recounted the proceedings that culminated in Mr. Gillies's April 5 letter and the County's determination that Deputy Administrator Smith's May 24, 2024 certification of consistency was not a "decision made by an administrative officer 'in the administration or enforcement of'" Virginia's zoning enabling act or an ordinance adopted thereunder.

59. In their request, the Residents contended that the conditional use approval granted to Dominion in 2010 for the Existing Plant does not cover the Proposed Plant because the Zoning Ordinance requires a project within a conditional use category to be individually considered with respect to its specific characteristics, impacts on nearby residents, and public need.

60. The Residents further argued that Mr. Gillies's April 5 letter does not even purport to indicate that the Proposed Plant would be a permitted use on the Coxendale Road Property, as it does not mention any new or proposed project.

61. On October 18, 2024, Mr. Gillies responded to the Residents' request for determination with a one-page letter that read, in substantive part:

> Your letter relates to the Subject Property and Dominion Energy Virginia's proposed Chesterfield Energy Reliability Center ("CERC"). Your letter is in connection with an air quality permit application for the CERC which is pending before the Virginia Department of Environmental Quality. Neither you nor your clients have a legal interest in the Subject Property. Nor is there a pending application or request for relief of any kind regarding the Subject Property pending before the Planning Department.
>
> As such, your letter is asking me to give an advisory opinion. My Written Determination dated April 5, 2024, fully answers your letter.

The Residents Appeal to the Board of Zoning Appeals

62. Virginia Code § 15.2-2311(A) provides a statutory right of "appeal to the board [of zoning appeals] . . . by any person aggrieved . . . by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of" Virginia's zoning enactment law or any ordinance adopted thereunder.

63. Likewise, the County's Zoning Ordinance allows "an appeal to the board of zoning appeals [to] be taken by any person aggrieved . . . from any decision or determination made by the director of planning on zoning matters within the scope of his authority or any other administrative officer in the administration or enforcement of" the Ordinance. Chesterfield Code § 19.1-5(B)(1).

64. Chesterfield Code § 19.1-5(B)(2) provides that appeals may be taken by filing a notice of appeal with the director of planning, who thereafter "shall transmit the appeal to the board of zoning appeals along with all of the papers constituting the record of the initial decision."

65. The Chesterfield County Board of Zoning Appeals requires that all appeals from a zoning determination be submitted through the County's Enterprise Land Management (ELM) citizen access portal.

66. At approximately 1:30 pm on November 18, 2024, counsel for the Residents uploaded and submitted through the ELM platform a document styled "Notice of Appeal of October 18, 2024 Written Zoning Determination."

67. The opening sentence of the Notice of Appeal identified it as an appeal under "Virginia Code § 15.2-2311 and Section 19.1-5(B) of the Chesterfield County Zoning Ordinance." The description of the document in the ELM platform was "Appeal of the Planning Department's October 18 Written Determination in response to the Appellant's July 24, 2024 Written Zoning Determination Request."

68. At 1:31 pm on November 18, 2024, Residents' counsel received an email message confirming that the document had been filed and assigned Record No. 24WD0165. The confirmation email further stated:

> The Planning Department will begin reviewing your application and determine if the application is complete within one (1) business day. If modifications to your application are necessary, a member of Planning staff will contact you to make modifications. If the application is deemed complete by staff, your application will be invoiced for a fee (if applicable) and a follow-up e-mail with directions

> on how to pay the application's invoice will be sent to your account's e-mail address.

69. Immediately after filing, Residents' counsel realized that they had erroneously selected "Request Written Determination" rather than "Submit an Application" from a filing options menu on the ELM platform, resulting in the system categorizing the "record type" as a "Written Determination" request rather than an appeal of a written determination. Counsel promptly attempted to re-file the document through the ELM platform under the appropriate categorization. An error message in the ELM platform, however, advised the Residents' counsel that the system would not accept the appeal because it had already been filed. It was therefore impossible to re-file without assistance from the Planning Department.

70. The County's website advises ELM users that, if they "need additional assistance between the hours of 8:30 a.m. – 5 p.m. Monday–Friday, excluding holidays," they should "Email Planning" at Planning@chesterfield.gov "or call 804-748-1050."

71. November 18, 2024 was a Monday and was not designated as a legal holiday under Virginia Code § 2.2-3300.

72. At 2:03 pm, the Residents' counsel sent the following email to the Planning Department at Planning@chesterfield.gov:

> Good afternoon,
>
> A few minutes ago, I submitted an appeal to the BZA of a written zoning determination made in response to our July 24 request (24WD0090). After submitting, I realized that it was not correctly labeled as an appeal and that I should have submitted it through a different pathway in the portal. I attempted to delete the application

> to resubmit, but I could not find a way to do that. I also attempted to submit the appeal additionally under the correct pathway so that it would be accurately labeled as an appeal, but I received an error message indicating that I could not do so because I had already submitted the application. Please let me know if there is anything I need to do to make sure this appeal is deemed appropriately filed so that it can be processed. Today is the deadline for the appeal.
>
> I will follow up with a phone call this afternoon if I do not hear back from you.

73. At 2:33 pm, the Residents' counsel called the Planning Department at 804-748-1050 to request help with re-filing. After no one answered the phone, counsel left a voicemail message explaining the problem and emphasizing the urgency of resolving it in light of the filing deadline.

74. No one from the Planning Department returned counsel's call.

75. At 12:54 pm the following day, November 19, 2024, the Residents' counsel received the following email message from County Planning Administrator Norman Campbell:

> Good afternoon,
>
> I have cancelled your earlier submittal for a Written Determination. There is a separate application specifically for "Appeals".
>
> You can file that type of application through our ELM portal as well, via the Planning Department's website. Please let me know if you have other questions. Thank you.

76. Counsel immediately re-filed the appeal and received an email message from the ELM platform at 1:33 p.m. on November 19, 2024, confirming that the appeal had been filed and assigned Record No. 24AP1323. The message included the same language quoted above in paragraph 68.

77. At 2:41 pm on November 19, the Residents' counsel received an email message requesting "additional information" in support of the appeal. Under the heading "Intake Reviewer's Comments," the message read:

> A Disclosure Affidavit is required for all applications that require a public hearing in Chesterfield County, such as this one. Please complete a Disclosure Affidavit and add that to your application.

78. Counsel had uploaded a Disclosure Affidavit with the attempted re-filing on November 18 and the successful re-filing on November 19, but had marked the form affidavit "Not Applicable" and otherwise left it blank because it did not, on its own terms, apply to the appeal. The form affidavit requires, for example, that affiants swear and affirm that they are an applicant or a representative thereof for a "land use amendment" and to identify by Tax ID Number the "subject of the land use amendment application."

79. Upon receiving the "Intake Reviewer's Comments" quoted above in paragraph 77, the Residents' counsel again reviewed the Disclosure Affidavit form, confirmed that it was not applicable to the appeal, and sent the following email message to Mr. Campbell at 3:24 pm:

> Good afternoon Mr. Campbell,
>
> We received this email (attached below) from the ELM portal. It indicates that our appeal application is currently considered incomplete because a Disclosure Affidavit is required. I had previously uploaded a copy of the Disclosure Affidavit and marked it "not applicable."
>
> I cannot swear to the items on the Disclosure Affidavit because our appeal is of a Written Determination and in no way seeks a land use amendment. For example, Item #1 on the Disclosure Affidavit begins "I am the applicant/agent for the land use amendment on the property . . ." Item #2 requires information about the owners of the "Subject Property which is the subject of the land use amendment application." This is an appeal of a Written Determination, not of a

> land use amendment application, so the Disclosure Affidavit clearly does not apply to our appeal.
>
> Instead, our appeal is submitted pursuant to Virginia Code § 15.2-2311(A), which gives "any person aggrieved" the right to an appeal "from any order, requirement, decision or determination made by an[ ] administrative officer in the administration or enforcement of . . . any ordinance adopted pursuant to" the zoning enabling law.
>
> Please confirm that our appeal application is complete or advise how we can complete our appeal application.

80. At 9:35 am on the following day, November 20, 2024, Mr. Campbell responded by email instructing the Residents' counsel to exercise due diligence to list ownership interests in the property at issue and to determine which members of the County Board of Supervisors or Planning Commission have financial interests in the property at issue.

81. After counsel inquired whether Board of Supervisors or Planning Commission members publicly disclose their ownership in corporations that might have a financial interest in the property—information required in order to complete item 7 of the form affidavit—Mr. Campbell advised that "N/A" or "unknown" was a permissible response for information not presently known to the filer. The Residents' counsel completed the form affidavit accordingly and submitted it through the ELM platform on November 20, 2024.

82. On November 21, 2024, the Planning Department requested that the Residents remit the $700 filing fee. Counsel promptly tendered the $700 fee as instructed under Receipt No. 20240019629.

83. In the Notice of Appeal filed on November 18 and re-filed on November 19, 2024, the Residents requested the Board's review of Mr. Gillies's determination that his prior

determination dated April 5, 2024 "fully answers" the Residents' request for determination. The Notice of Appeal explained that the Residents' inquiry, unlike the Dominion request that elicited the April 5 determination, related specifically to the Proposed Plant rather than the "current use" of the Coxendale Road Property for the Existing Plant.

CLAIMS & PRAYERS FOR RELIEF

I.

Declaratory Judgment Against Dominion

84. The Residents incorporate by reference the allegations set forth above in paragraphs 1–83.

85. The Virginia Declaratory Judgment Act, Virginia Code §§ 8.01-184 – 8.01-191, allows this Court "to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed" over "[c]ontroversies involving the interpretation of . . . statutes, municipal ordinances and other governmental regulations," *id.* § 8.01-184.

86. Virginia courts have recognized declaratory actions as a proper vehicle for determining whether a proposed facility requires a permit under applicable land use regulations. *See*, *e.g.*, *Loudoun County Board of Supervisors v. Town of Purcellville*, 276 Va. 419, 435–36 (2008); *Mason v. Fairfax County*, 32 Va. Cir. 227 (Fairfax 1993). The availability of declaratory relief is particularly appropriate where local officials have refused to docket a zoning appeal under the theory that the underlying determination was non-binding and that an appeal was thus "premature." *Loudoun County*, 276 Va. at 427–28, 435–36.

87. A declaratory judgment is appropriate in "cases of 'actual controversy' involving an actual 'antagonistic assertion and denial of right.'" *Ames Center v. SOHO Arlington LLC*, 301 Va. 246, 253 (2022) (quoting *USAA Casualty Insurance v. Randolph*, 255 Va. 342, 346 (1998)).

88. In land use cases, the Supreme Court of Virginia has held that an actual controversy exists where one party "asserts . . . the actual, present right to construct and operate" a specific land use "without submitting to [any] special exception requirements," and another "denies this assertion." *Southland*, 224 Va. at 520.

89. As detailed above in paragraphs 49–53, Dominion has asserted to both state and local authorities that it has a right to construct and operate the Proposed Plant on the Coxendale Road Property without any additional conditional use approval.

90. Conversely, the Residents have denied that assertion as detailed above in paragraphs 56–60, and they continue to deny that assertion for the reasons recounted below in paragraphs 109–122.

91. Declaratory relief is available regardless of whether "an application for specific relief is pending" before local authorities. *Cf. Graydon Manor LLC v. Loudoun County Board of Supervisors*, 79 Va. App. 156, 167 (2023). *See*, *e.g.*, *Cupp v. Fairfax County Board of Supervisors*, 227 Va. 580 (1984); *Town of Purcellville*, 276 Va. 419; *Southland Corp.*, 224 Va. 514.

92. Our Supreme Court has held that "[t]he intent of the declaratory judgment statutes is not to give parties greater rights than those which they previously possessed, but to permit the

declaration of those rights before they mature." *Charlottesville Area Fitness Club Operators Association v. Albemarle County Board of Supervisors*, 285 Va. 87 (2013).

93. Although Mr. Gillies has erroneously concluded that the Residents have no right to avail themselves of the determination and appeal provisions of Virginia Code § 15.2-2286(A)(4) and § 15.2-2311(A), declaratory relief is available regardless of whether the Residents are entitled to a formal determination by the zoning administrator or to an appeal of that determination.

94. Separately and apart from their right to pursue a formal zoning determination under Virginia Code § 15.2-2286(A)(4) or their right to appeal that determination under Virginia Code § 15.2-2311, affected landowners have a right under Virginia's zoning enactment law to "prevent[ ], restrain[ ], correct[ ], or abate[ ]" the construction of a building that is in "violation of the zoning ordinance." Virginia Code § 15.2-2313. The "direct access" provision of Virginia Code § 15.2-2313 expressly authorizes the circuit court to "hear and determine" such a case up to fifteen days after the issuance of a building permit, provided the complainant "had no actual notice of the issuance of the permit." Accordingly, the Residents "ha[ve] a 'justiciable interest' in the subject matter" of their request and an independent "foundation in law for the judgment sought." *Deerfield v. City of Hampton*, 283 Va. 759, 764 (2012) (quoting *W.S. Carnes Inc. v. Chesterfield County Board of Supervisors*, 252 Va. 377, 383 (1996); *Dunn McCormack & MacPherson v. Connolly*, 281 Va. 553, 558 (2011)).

95. The mere fact that a proposed facility will require additional governmental approvals or that the proponent's plans "may undergo revision prior to . . . final approval to begin construction" does not preclude declaratory relief. *Hoffman Family LLC v. Mill Two Associates Partnership*, 259 Va. 685, 693–94 (2000). An actual controversy exists so long as (a) the proponent has "taken substantial steps" towards developing the property in a manner that would violate legal requirements, and (b) there is no basis for assuming "that those plans would be altered so radically as to render speculative the central issue raised in th[e] declaratory judgment suit." *Hoffman Family*, 259 Va. at 694.

96. Accordingly, an affected landowner need not wait until a developer has "submitted a final site plan for review and approval," provided its earlier submissions establish "a sufficiently 'ripe' controversy for purposes of examining the case on [its] merits." *Morgan v. Hanover County Board of Supervisors*, 302 Va. 46, 68–69 & n.11 (2023).

97. As detailed above in paragraphs 49–53, Dominion has informed regulators not only that it plans to construct a second power plant on the Coxendale Road Property, but that the County's prior approval of the existing plant obviates any need for special exception approval of a second plant.

98. Dominion's plan to construct and operate a second power plant on the Coxendale Road property is, therefore, not "so speculative and indefinite as to not rise to the level of a justiciable controversy." *Hoffman Family*, 259 Va. at 693–94. The Court can resolve the question raised in this action based entirely "on present, not future or speculative, facts

that are ripe for judicial assessment." *Stafford County School Board v. Sumner Falls Run LLC*, 903 S.E.2d 242, 245 (Va. 2024).

99. The Residents have standing to seek a declaration of rights under the zoning ordinance because they satisfy the two requisite "personal-stake factors" under Virginia law. *Morgan*, 302 Va. at 59.

100. As detailed above in paragraphs 1–9, the Residents each "own or occupy real property within or in close proximity to the property that is the subject of the land use determination, thus establishing that [they have] a direct, immediate, pecuniary, and substantial interest in the decision." *Id.* (quoting *Anders Larsen Trust v. Fairfax County Board of Supervisors*, 301 Va. 116, 121 (2022)).

101. In addition, the construction and operation of the Proposed Plant on the Coxendale Road Property—and, more specifically, the construction and operation of the Proposed Plant without any additional review or the imposition of project-specific conditions by the Board of Supervisors—will "impos[e] a burden or obligation upon the [Residents] different from that suffered by the public generally." *Id.*

102. The air pollution from the Proposed Plant detailed above in paragraphs 29–30 includes "non-threshold pollutants" like fine particulate matter ($PM_{2.5}$), which "inflict a continuum of adverse health effects at any airborne concentration greater than zero." *Whitman v. American Trucking Associations*, 531 U.S. 457, 475 (2001). Other pollutants from the Proposed Plant, including NO_x, VOCs, and CO, are precursors of another non-threshold pollutant, ozone, because they react with heat and sunlight to create ozone. Any

incremental increase in the concentration of non-threshold pollutants or non-threshold-pollutant precursors imposes a burden on the Residents greater than that experienced by those who reside farther away from the plant.

103. To determine the extent to which air pollution from the Proposed Plant will impact communities identified in the Virginia Environmental Justice Act, Virginia Code §§ 2.2-234 – 2.2-235—an analysis required under Virginia's air permitting laws[1]—Dominion used a three-mile buffer as its "study area."

104. Residents Brankley and Farooq both live within a three-mile radius of the Coxendale Road Property, and Resident Besa recreates in areas within the three-mile radius and directly adjacent to the Property.

105. The proximity of the Residents' properties to the Coxendale Road Property also means that they will experience increased noise, traffic, and light pollution associated with the construction and operation of a large power plant, as well a potential diminution in property values.

106. If it is determined that the Proposed Plant requires a conditional use permit, however, the Residents may not suffer those burdens or the burdens may be mitigated. For instance, the Board of Supervisors may deny the Proposed Plant a conditional use permit at the Coxendale Road Property. In that instance, the Residents would not be subjected to elevated concentrations of the non-threshold pollutants that the Proposed Plant would

1 *See generally Friends of Buckingham v. State Air Pollution Control Board*, 947 F.3d 68, 87 (4th Cir. 2020) (applying Virginia law).

emit or that would result from precursors emitted by the Plant. Similarly, the Residents may benefit from conditions for the reduction of traffic, noise, dust, and/or light pollution imposed in the conditional use permit process.

107. The prospect that conditional use permitting or other requirements under the Ordinance *may* eliminate or ameliorate the impacts felt by the Residents establishes their standing to insist on compliance with those requirements, regardless of whether that compliance will necessarily produce a different result. *See Morgan*, 302 Va. at 65 ("A claimant 'assuredly can' seek to enforce 'procedural rights' that affect the public at large 'so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); *see also id.* at 66 n.10 ("A plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered.") (quoting *Sugar Cane Growers' Cooperative v. Veneman*, 289 F.3d 89, 94 (D.C. Cir. 2002)).

108. Before Dominion may begin construction of the Proposed Plant at the Coxendale Road Property, it must obtain a conditional use permit from the County Board of Supervisors that applies specifically to the proposed project at the proposed site.

109. As the Residents explained in their July 24, 2024 written determination request and their November 18, 2024 Notice of Appeal, the Proposed Plant requires conditional use approval to operate at the Coxendale Road Property because that property is zoned Heavy Industrial (I-3) and Ordinance Table 19.1-52.A lists "[e]lectric power plant producing power for

others" as a conditional use within the County's Heavy Industrial (I-3) zoning district. Chesterfield County Code § 19.1-52(C)(4) therefore requires Dominion to obtain conditional use approval from the Board of Supervisors in accordance with the standards outlined in Section 19.1-11.

110. As the Residents further explained in their July 24, 2024 written determination request and their November 18, 2024 Notice of Appeal, the conditional use approval granted to Dominion in 2010 for the Existing Plant does not cover the Proposed Plant. Under Chesterfield County Code § 19.1-11(A), a project that falls within a conditional use category must be individually considered as to its specific characteristics, its impacts on nearby residents, and its public need. That Section describes conditional uses as follows:

> Certain uses, due to their unique characteristics, cannot be permitted by right or with restrictions in a particular district without individual consideration of the impact of those uses on neighboring land and of the public need for the use at a specific location. Conditional uses are of such a nature that their operation requires special treatment to create a satisfactory environment with respect to their impact on neighboring property or public facilities.

111. Conditional use permits are a form of special exception under Virginia's zoning enabling law. *See* Kamptner, *supra*, § 12-100 ("Special exceptions are also known as *special use permits* or *conditional use permits*[.]"); *see also*, *e.g.*, *Heater v. Warren County Board of Supervisors*, 59 Va. Cir. 487, 1995 WL 1055851, *8 (Warren 1995) (identifying now-Virginia Code § 15.2-2286(A)(3) as the statutory basis for both special exceptions and conditional use permits); *Virginia Beach City Council v. Harrell*, 236 Va. 99, 102 (1988) (equating special and conditional use permits); *Arlington County Board v. Bratic*, 237 Va. 221, 226 n.1 (1989) ("[T]he terms 'special exception' and 'special use permit' are interchangeable.") (quoting

Southland, 224 Va. at 521). As the name suggests, a special exception use is one prohibited by default—"a use that is generally inappropriate for the area in which it is situated but that is permitted after additional controls and safeguards are instituted 'to ensure its compatibility with permitted principal uses." *Alaska Railroad v. Native Village of Eklutna*, 43 P.3d 588, 592 (Alaska 2002); *see also Stratford Marine Corp. v. Fairfax County Board of Supervisors*, 8 Va. Cir. 153, 1986 WL 740427, *2 (Fairfax 1986) ("By definition, a special use is an unfavored use.").

112. Because conditional uses are by default incompatible with a zoning district's by-right uses, denying a conditional use permit after individualized consideration is an act within the Board of Supervisors' broad legislative discretion. *City Council of City of Virginia Beach v. Harrell*, 236 Va. 99, 101 (1988). The Board of Supervisors has discretion to deny a conditional use permit regardless of whether all "technical requirements of a zoning ordinance have been met" that would allow for the issuance of the conditional use permit. *Bratic*, 237 Va. at 226. The Board of Supervisors may deny the Proposed Plant a conditional use permit at either the Coxendale Road Property, or any other property zoned Heavy Industrial (I-3), after, for example, determining that the Proposed Plant's emissions, traffic, noise, dust, light pollution, or other impacts on neighboring properties, including nearby residential communities, make it incompatible with the proposed location.

113. Interpreting a 2010 approval of a conditional use to allow for a completely new and different facility to be built over a decade later would conflict with the nature and purpose of conditional uses. Like all other projects that fall within a conditional use category, the

Proposed Plant must be individually considered as to its specific characteristics, its impacts on nearby residents, and its public need. *See* Chesterfield County Code § 19.1-11(C).

114. Virginia courts have rejected the argument that a conditional use permit—even a broadly-worded one—allows the permittee to establish a new facility on property previously approved for the same use category. *See generally Virginia Psychiatric v. Fairfax County Zoning Appeals Board*, 47 Va. Cir. 36 (Fairfax 1998) (rejecting landowner's argument that a special exception "to operate 'psychiatric facilities'" on a property allowed it to operate a new psychiatric facility on site). Were it otherwise, the governing body would be powerless to develop conditions capable of ensuring a conditional use will, in fact, be harmonious with neighboring uses and the locality's overall land use plan.

115. If a locality believes it can dispense with an individualized, case-by-case review of all facilities that fall within a broad use category, the proper recourse is to reclassify that use category as a by-right use. It cannot use the special exception process as an end-run around a formal rezoning. *See Laird v. City of Danville*, 225 Va. 256, 262 (1983) ("[A]n overriding requirement of zoning law in Virginia [is that] only the governing body of a locality may zone or rezone property, and then *only by ordinance*."); *see also* Chesterfield County Code § 19.1-9(A) (providing that all rezonings must first be "presented to the planning commission for recommendation").

116. In 2010, the Board of Supervisors conducted an individualized review of the Existing Plant and developed a slate of "conditions and restrictions . . . necessary to protect the public interest and secure [its] compliance with the guidelines" enumerated in the County Code.

Chesterfield County Code § 19.1-11(E). That review was specific to the Existing Plant and cannot stand in for the Proposed Plant.

117. The Existing Plant and the Proposed Plant are quite different with respect to the factors the Board of Supervisors would consider in deciding whether to grant a conditional use permit and, if so, the conditions under which a permit could properly issue.

118. For example, Dominion plans for the Proposed Plant to be powered not only with gas and fuel oil, but with a hydrogen fuel blend as well. According to the U.S. Department of Energy, hydrogen fuel "has a wide range of flammable concentrations in air and lower ignition energy than gasoline or natural gas" and therefore "require[s] additional engineering controls to enable its safe use." United States Department of Energy, *Safe Use of Hydrogen*, https://www.energy.gov/eere/fuelcells/safe-use-hydrogen (accessed January 12, 2025). The Board had no opportunity in 2010 or in any proceeding thereafter to consider the safety or emergency services implications of this new fuel.

119. Furthermore, the air quality impacts associated with the Proposed Plant will be qualitatively different than those considered in approving elements of the Existing Plant. The Proposed Plant's gas turbines will be configured as simple-cycle units, in contrast to the combined-cycle units operating at the Existing Plant. Combined-cycle units are generally more efficient than simple-cycle units and combined-cycle units more commonly serve as baseload units with fewer start-up and shutdown cycles. Emissions during start-up and shutdown events "often far exceed emissions from normal operations because facilities may operate less efficiently than during steady-state operation and because facilities often bypass controls

when they are starting up, shutting down, or malfunctioning." *Environmental Committee of Florida Electric Power Coordinating Group v. Environmental Protection Agency*, 94 F.4th 77, 118 (D.C. Cir. 2024) (Pillard, J., concurring in part and dissenting in part).

120. The analysis of how the new facility would affect the surrounding community will also differ from the analysis conducted in 2010, as the Proposed Plant's hourly, annual, and cumulative emissions will differ from those of the Existing Plant. And with the lifespan of the Proposed Plant extending decades longer into the future, the timeline of the community impacts will necessarily be much longer than the timeline of impacts considered by the Board of Supervisors in 2010.

121. Likewise, an analysis of the public need for the new facility and its effect on the surrounding community will necessarily be different now than in 2010. Chesterfield County currently leads Virginia in population growth. Thad Green, *Chesterfield Leads Virginia in Population Growth*, Richmond Times Dispatch (May 17, 2024), available at https://bit.ly/4f1AkOa. It cannot be assumed that the character, needs, and preferences of the surrounding community are the same as they were fifteen years ago.

122. Finally, allowing Dominion to build its Proposed Plant under the Existing Plant's conditional use permit would deprive Chesterfield County residents of the opportunities for public involvement afforded by the conditional use permitting process. The conditional use process includes the applicant's submission of supporting documents that would help to inform the public about the proposed project, notices to adjacent property owners and the local community, public hearings before the Planning Commission and the Board of

Supervisors, and a right to appeal the Board of Supervisors' decision. Chesterfield County Code §§ 19.1-9 (Figure 19.1-9), 19.1-13. Allowing Dominion to bypass this process would be unlawful and would deprive the residents of Chesterfield County of their right to participate in significant county zoning decisions.

123. Wherefore, Residents Brankley, Farooq, and Besa respectfully ask the Court to:

(a) declare that the Proposed Plant requires a conditional use permit from the County Board of Supervisors before commencing construction if built at the Coxendale Road Property or any other property zoned Heavy Industrial (I-3);

(b) declare that the conditional use approval regarding the existing Chesterfield Power Station granted to Dominion in prior zoning cases does not constitute conditional use approval of the Proposed Plant;

(c) award the Residents their reasonable costs in bringing this action; and

(d) grant such additional relief as the Court deems just and proper.

II.

Declaratory Judgment Against Mr. Gillies

124. The Residents incorporate by reference the allegations set forth above in paragraphs 1–83, 85–96 and 98–122.

125. Like Dominion, Mr. Gillies has also asserted that the Proposed Plant does not require further conditional use review and approval under the County's Zoning Ordinance.

126. As recounted above in paragraph 61, Mr. Gillies's October 18, 2024 determination letter stated that his prior, April 5, 2024 determination letter "fully answers" the Residents' July

24, 2024 request. In refusing to acknowledge the distinction between the prior conditional use approval of the Existing Plant and the need for similar approval of the Proposed Plant, Mr. Gillies's October 18, 2024 letter can only be understood as a determination that the Proposed Plant does not require additional conditional use review and approval.

127. Similarly, in responding to the Residents' precautionary appeal of Deputy Administrator Smith's certification under Virginia Code § 10.1-1321.1, Mr. Gillies claimed that his April 5, 2024 determination refuted the Residents' contention that Dominion lacks a conditional use permit for the Proposed Plant.

128. Mr. Gillies's July 8, 2024 and October 18, 2024 letters therefore represent an "antagonistic assertion" of a right that the Residents deny, establishing an actual controversy ripe for judicial resolution.

129. For the reasons detailed above in paragraphs 85–96 and 98–122, the Residents are entitled not only to a declaratory judgment, but a declaration that the Proposed Plant requires conditional use review and approval under the Zoning Ordinance.

130. Wherefore, Residents Brankley, Farooq, and Besa respectfully ask the Court to:

    (a) declare that the Proposed Plant requires a conditional use permit from the County Board of Supervisors before commencing construction if built at the Coxendale Road Property or any other property zoned Heavy Industrial (I-3);

    (b) declare that the conditional use approval regarding the existing Chesterfield Power Station granted to Dominion in prior zoning cases does not constitute conditional use approval of the Proposed Plant;

(c) award the Residents their reasonable costs in bringing this action; and

(d) grant such additional relief as the Court deems just and proper.

III.

Writ of Mandamus Against Mr. Gillies
Appeal of Mr. Gillies's October 18, 2024 Determination

131. The Residents incorporate by reference the allegations set forth above in in paragraphs 1–83.

132. Mandamus may be employed "to compel a public official to perform a purely ministerial duty imposed upon him by law." *City of Hampton v. Williamson*, 302 Va. 325, 331 (2023) (quoting *Richlands Medical Association v. Commonwealth*, 230 Va. 384, 386 (1985)). "[A] ministerial act is 'one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done." *Id.*

133. A writ of mandamus "will issue where the petitioner has a clear right to the relief sought, the respondent has a legal duty to perform the act which the petitioner seeks to compel, and there is no adequate remedy at law." *Early Used Cars v. Province*, 218 Va. 605, 609 (1977).

134. Mandamus relief is appropriate where a public official refuses to process a claim that was filed in accordance with all statutory prerequisites. *See Johnson v. Wise County Circuit Court Clerk*, 904 S.E.2d 641, 642–43 (Va. 2024).

135. Under Virginia Code § 15.2-2286(A)(4) and Chesterfield Code § 19.1-5(A), any person may request in writing that the zoning administrator make a formal determination on matters within his authority. A zoning administrator "shall respond within 90 days of [such] a request . . . unless the requester has agreed to a longer period." Virginia Code § 15.2-2286(A)(4).

136. Under Virginia Code § 15.2-2311(A) and Chesterfield Code § 19.1-5(B)(1), any person aggrieved by a "decision or determination made by the director of planning on zoning matters within the scope of his authority" has a right to appeal that decision or determination to the Board of Zoning Appeals.

137. As noted above in paragraphs 12 and 18, Mr. Gillies has assumed authority to determine whether to place appeals of his decisions onto the Board's docket. However, upon the filing of a zoning appeal, Chesterfield Code § 19.1-5(B)(2) provides only that the "director [of planning] shall transmit the appeal to the board of zoning appeals along with all of the papers constituting the record of the initial decision."

138. The Residents are unaware of any provision in Virginia law that allows a zoning administrator to determine the Board's jurisdiction to consider an appeal of the zoning administrator's own determination. To the contrary, the Board is a quasi-judicial agency that, like a court, "always has jurisdiction to determine its own jurisdiction." *Rutter v. Oakwood Living Centers of Virginia*, 282 Va. 4, 13 (2011) (citing, *inter alia*, *United States v. United Mine Workers*, 330 U.S. 258, 292 n.57 (1947)); *Federal Power Commission v. Louisiana Power & Light*, 406 U.S. 621, 647 (1972) ("The need to protect the primary

authority of an agency to determine its own jurisdiction 'is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the agency. While the agency's decision is not the last word, it must assuredly be the first.'") (quoting *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U.S. 173, 185 (1962)). Indeed, an administrative agency has not just the power, but also "the duty to determine its own jurisdiction." *McDevitt v. Gunn*, 182 F. Supp. 335, 338 (E.D. Pa. 1960).

139. Even if the Board could delegate to another body the authority to determine its jurisdiction, it cannot delegate that function to an official whose interests are necessarily adverse to those of every party who invokes the Board's jurisdiction under Chesterfield Code § 19.1-5(B)(1) to review a "decision or determination made by the director of planning." The zoning administrator and the appellant appear as adverse parties before the Board in appeals under Virginia Code § 15.2-2311. *See* Virginia Code § 15.2-2308(C) (requiring that a board of zoning appeals "offer an equal amount of time in a hearing on the case to the applicant, appellant or other person aggrieved . . . and the staff of the local governing body"); *see also id.* § 15.2-2308.1 (governing *ex parte* communications between planning staff and Board).

140. Accordingly, Mr. Gillies has a ministerial duty to transmit the Residents' appeal of his October 18, 2024 determination to the Board in accordance with Chesterfield Code § 19.1-5(B)(2). *See Johnson*, 904 S.E.2d at 642 (holding that court clerks "have a ministerial duty to file pleadings without passing judgment on their validity").

141. Even if Mr. Gillies has some authority to decide whether an appeal is properly before the Board, he nonetheless had a ministerial duty to process the Residents' appeal of his October 18, 2024 determination.

142. The Residents have a clear right to have their appeal heard by the Board, as Virginia Code § 15.2-2311(A) gives "any person aggrieved" the right to an appeal "from any order, requirement, decision or determination made by an[ ] administrative officer in the administration or enforcement of . . . any ordinance adopted pursuant to" the zoning enabling law.

143. Mr. Gillies's October 18, 2024 determination is a "determination made by an administrative officer in the administration" of the County Zoning Ordinance.

144. As detailed above in paragraphs 99–106, the Residents were aggrieved by Mr. Gillies's October 18, 2024 determination, and each of the Residents "has a sufficient interest in the subject matter" of the underlying request such "that the parties will be actual adversaries and the issues will be fully and faithfully developed." *Anders Larsen Trust v. Fairfax County Board of Supervisors*, 301 Va. 116, 121 (quoting *Cupp*, 227 Va. at 589).

145. Contrary to Mr. Gillies's December 11, 2024 letter, Virginia law recognizes that neighbors affected by a proposed use may be aggrieved by a determination regarding that use, even if the developer has no "application . . . pending asking for specific relief." *Cf. Graydon Manor*, 79 Va. App. at 167.

146. *Graydon Manor* and the decisions cited therein address instances in which a developer has requested a preliminary answer to a question that will inevitably arise in the context of a

future "application . . . asking for specific relief." *Id.* at 167. In that dynamic, there exists an inherent "tension" between, on one hand, the "interests in finality and judicial economy" and, on the other, the principle of zoning law that "[u]se of a property should not be forever governed and restricted by the date at which an owner first seeks permission to alter the property." *Chilton-Belloni*, 294 Va. at 339–40. Thus, beginning with *Vulcan Materials v. Chesterfield County Board of Supervisors*, 248 Va. 18 (1994), courts have held that, where a zoning question will be more thoroughly considered upon "an application for specific relief," any preliminary answer to that question lacks "the finality of an 'order requirement, decision or determination'" appealable to the zoning board. *Graydon Manor*, 79 Va. App. at 168.

147. Virginia courts, however, have clarified that the rule does not apply in all circumstances:

> There was no denial of any personal or property right in *Vulcan* because no application was pending asking for specific relief. But that does not mean that decisions by a Zoning Administrator never impinge on 'personal or property rights, legal or equitable' unless an application for specific relief is pending. A Zoning Administrator may well make determinations affecting such rights without a pending application for specific relief.

Greene v. Fairfax County Board of Zoning Appeals, 34 Va. Cir. 227 (Fairfax 1994) (citing *Gwinn v. Alward*, 235 Va. 616 (1988)).

148. Mr. Gillies does not cite any instances in which courts have applied *Vulcan Materials* and its progeny to a case in which an administrator's determination represents the final word on a matter that will not resurface in a more structured proceeding—often precisely *because* of the administrator's determination. In that context, unlike in *Vulcan Materials* and *Graydon Manor*, the zoning administrator's determination exhibits "the finality of an 'order

requirement, decision or determination'" appealable to the zoning board. *Cf. Graydon Manor*, 79 Va. App. at 168

149. Were it otherwise, and if Mr. Gillies's interpretation of *Vulcan Materials* and *Graydon Manor* were correct, then Virginia courts at every level have for years exceeded their jurisdiction in considering appeals from zoning determinations procedurally identical to the determination that the Residents requested of Mr. Gillies below:

    (a) In *West Lewinsville Heights Citizens Association v. Fairfax County Board of Supervisors*, 270 Va. 259 (2005), a group of "nearby property owners" requested the zoning administrator determine if a public park's agreement to give a university soccer team periods of exclusive use of the park's facilities required a special use permit. The zoning administrator determined that no special use permit was required, and the neighbors appealed to zoning board, which overturned that determination. The Supreme Court entered final judgment upholding the zoning board's decision. If Mr. Gillies's interpretation were correct, then the Supreme Court erred by allowing the zoning board's decision to stand despite the absence of jurisdiction to consider an appeal from a zoning determination that did not relate to an "application for specific relief."

    (b) More recently, in *Anders Larsen Trust v. Fairfax County Board of Supervisors*, 301 Va. 116 (2022), our Supreme Court held that a circuit court had jurisdiction to review a zoning board decision upholding a determination that a residential treatment center did not require a special use permit. If Mr. Gillies's interpretation were correct, then

the Supreme Court erred by allowing the circuit court to evaluate a zoning determination that did not relate to an "application for specific relief."

(c) More recently still, the Fairfax County Circuit Court ruled in 2023 on the merits of an appeal from a zoning board decision that itself overturned an administrative decision that a natural gas transmission pipeline did not require a special use permit. *In re February 2, 2022 Decision of the Fairfax County Board of Zoning Appeals*, Nos. CL-2022-2942, CL-2022-3061 (Va. Cir. Fairfax October 12, 2023). That decision was made in response to a request by neighboring landowners for a determination that the pipeline did require a permit. If Mr. Gillies' interpretation were correct, the circuit court erred by considering the merits of a zoning board decision made outside that body's jurisdiction, given that the underlying determination did not relate to any then-pending "application for specific relief."

In each of these cases, courts acted contrary to Mr. Gillies's theory despite their "independent duty to determine whether the [lower tribunal] had jurisdiction when it issued its orders." *Highsmith v. Highsmith*, Record No. 0395-19-4, 2019 WL 6314801, *7 (Va. App. November 26, 2019) (unpublished).

150. Aside from the declaratory relief requested above in paragraphs 123 and 130, the Residents have no other adequate means for obtaining the timely and efficient resolution of their inquiry. The Residents have no remedy by certiorari, as the December 11 Letter is not a "decision of the board of zoning appeals" within the meaning of Virginia Code § 15.2-2314. Under Virginia law, the Board may act only at a duly noticed meeting, *Berry v. Fairfax*

County Board of Supervisors, 302 Va. 114, 147 (2023), and only as "authorized by a majority of [its member] present and voting," Virginia Code § 15.2-2308(C). Upon information and belief, the Residents believe that the Board did not deliberate, vote, or make any decision regarding the Residents' November 18, 2024 appeal at the Board's December 4, 2024 meeting. *See also id.* § 2.2-3710(A) (nullifying any "vote of any kind of the membership . . . of a public body . . . other than [one] taken at a meeting conducted in accordance with" the Virginia Freedom of Information Act). Accordingly, there is no "decision of the board of zoning appeals" subject to appeal under Virginia Code § 15.2-2314. *Cf. Town of Purcellville*, 276 Va. at 430–40 (affirming trial court's ruling on certiorari, which in turn upheld a determination *of the BZA itself*, "[f]ollowing a hearing, . . . that it did not have jurisdiction to consider an appeal").

151. The Residents are also entitled to a writ of mandamus because, contrary to Mr. Gillies's claims in his December 11, 2024 letter, their appeal was timely filed and perfected.

152. As Mr. Gillies acknowledges in his letter, the Board's jurisdiction is entirely statutory. Where a land use proceeding is "purely statutory in nature," Virginia law requires this Court determine what constitutes proper filing based purely on "what the provisions of [the] Code . . . mandate for the proper institution of a proceeding thereunder." *Fairfax County Board of Supervisors v. Fairfax County Board of Zoning Appeals*, 225 Va. 235, 238 (1983); *see also Johnson*, 904 S.E.2d 641 (differentiating statutes that merely require the payment of fees from those that require fees be paid *at the time of filing*).

153. Here, Virginia Code § 15.2-2311 governs appeals from a zoning determination. On its face, the statute provides that an appeal is "taken within 30 days after the decision appealed from by filing with the zoning administrator, and with the board, a notice of appeal specifying the grounds thereof." Virginia Code § 15.2-2311(A). "[N]o action other than the filing of a proper [appeal] within the time prescribed period is declared necessary to complete the institution of the proceeding." *Fairfax County Board of Supervisors*, 225 Va. at 238.

154. The General Assembly alone is entitled to define the Board's jurisdictional prerequisites, and it has legislated that Board jurisdiction attaches—that is, that an "appeal [is] taken"—upon the "filing with the zoning administrator, and with the board, a notice of appeal specifying the grounds" for the appeal. Virginia Code § 15.2-2311(A).

155. As such, the Residents properly filed their appeal and invoked the Board's jurisdiction so long as they "fil[ed] with the zoning administrator, and with the board, a notice of appeal specifying the grounds" for the appeal within 30 days of the underlying decision. *Id.*

156. In determining whether a pleading has been "filed" within the applicable time limit, there is broad consensus that a pleading "is filed for statute of limitations purposes when it is in the actual or constructive possession of the clerk." *Rodgers ex rel. Jones v. Bowen*, 790 F.2d 1550, 1552 (11th Cir. 1986) (citing *Leggett v. Strickland*, 640 F.2d 774, 776 (5th Cir. 1981)); *see also Smith v. Frank*, 923 F.2d 139, 141 (9th Cir. 1991) ("The consensus is that papers and pleadings including the original complaint are considered filed when they are placed in the possession of the clerk of court."); *Robinson v. Yellow Freight System*, 892 F.2d 74 (4th Cir.

1989) (per curiam) ("[F]iling a complaint requires nothing more than delivery to a court officer authorized to receive it."); *accord Farley v. Koepp*, 788 F.3d 681, 685 (7th Cir. 2015); *McDowell v. Delaware State Police*, 88 F.3d 188, 191 (3d Cir. 1996); *Chien v. Commonwealth Biotechnologies*, 484 B.R. 659, 663 (E.D. Va. 2012); *Innovatit Seafood Systems v. Commissioner for Patents*, 240 F.R.D. 23, 25–26 (D.D.C. 2007); *Creasy v. United States*, 4 F. Supp. 175, 177–78 (W.D. Va. 1933). Accordingly, the Supreme Court of Virginia has held that a notice of appeal "is 'filed' when delivered to the clerk by the agent selected by counsel." *Mears v. Mears*, 206 Va. 444, 446 (1965).

157. Applying this rule in the context of electronic filing systems like the County's ELM platform, courts have held that a pleading is timely filed so long as it is "in the clerk's electronic data base and thus in the clerk's possession and control" before the filing period ends. *Bires v. Ingles Markets*, No. 3:23-cv-00136-TCB-RGV, 2023 WL 11915709, *7 (N.D. Ga. October 25, 2023) (quoting *In re Patel*, No. 4:05-CV-118 (CDL), 2006 WL 318613, *3 (M.D. Ga. January 30, 2006)).

158. "Furthermore, once a filing is received into the clerk's possession and control, it is typically deemed filed as of that date even if it is not in the proper form or does not fully comply with other prerequisites for maintaining an action." *In re Patel*, 2006 WL 318613, at *3.

159. So-called "errors of form" in an electronic filing include, notably, a "failure to electronically transmit [a] notice of appeal with the proper event code." *Vince*, 604 F.3d at 393; *accord United States v. Gonzalez-Flores*, 811 F. App'x 427, 428 (9th Cir. 2020) ("[T]he government's filing of a second, identical notice of appeal . . . after the district court's clerk's office

requested the first notice be refiled under the correct 'event' code does not render the appeal untimely.").

160. Thus, the Residents' Notice of Appeal was timely filed notwithstanding the fact that their initial submission was made using an incorrect event code within the ELM platform. The statutorily-required pleading was within Mr. Gillies's actual and/or constructive possession before 30 days had passed from his determination. Moreover, in addition to placing the appeal within Mr. Gillies's actual and/or constructive possession, submission of the Notice of Appeal through the ELM platform constituted filing with the Board in accordance with the instructions provided on the Board's website. *See also* Chesterfield County Code § 19.1-5(B)(2) (requiring the zoning administrator to transmit to the Board all appeals filed with him).

161. Likewise, the Residents' Notice of Appeal was timely filed notwithstanding the fact that their initial submission marked all (rather than merely some) of the form Disclosure Affidavit "not applicable." The plain language of the form affidavit was, in fact, not applicable to the Residents. Even if the Planning Department is entitled to require such an affidavit as a prerequisite for obtaining relief, it is not a statutory prerequisite for filing a zoning appeal, and the County may not by rule "create or withdraw [its] jurisdiction." *Smith v. Commonwealth*, 56 Va. App. 351, 358 (2010) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 453 (2004)).

162. Alternatively, as none of the alleged deficiencies in Mr. Gillies's letter relate to statutory requirements, each alleged requirement therein must be evaluated as a mere "rule of

practice" before the Planning Department. Under Virginia law, all such rules "must be reasonable, must not contravene the Constitution or statutes, or affect substantive law" or any "vested or substantial right." *Raiford v. Raiford*, 193 Va. 221, 224 (1952).

163. A statutory right to appeal is a vested and substantial right under Virginia law, as well as "a species of property protected by the Fourteenth Amendment's Due Process Clause." *Hutchins*, 27 Va. App. at 601 n.1 (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)).

164. Therefore, any rejection of the Residents' timely appeal due to the use of an incorrect error code unreasonably contravened the Residents' vested rights because the Planning Department's ELM system neither allowed the Residents to fix that error once they discovered it nor allowed them to refile their appeal under the appropriate event code without the Department's intervention.

165. Any rejection of the Residents' timely appeal due to the use of an incorrect error code was also unreasonable because the Planning Department was not available by e-mail or telephone during established business hours to discuss the problem and did not return the Residents' e-mail or call inquiring as to how to fix the issue until after the filing deadline. *See also Palcar Real Estate v. Commissioner of Internal Revenue*, 131 F.2d 210, 213 (8th Cir. 1942) (holding that a statutory right to review "will not be permitted to be defeated by the mere incident that there was no one present" in the appropriate office "to receive the paper").

166. Similarly, any rejection of the Residents' timely appeal due to a failure to remit the required fee during the 30-day appeal period unreasonably contravened the Residents' vested rights because the Planning Department's filing system lacked the functionality to pay the fees without further Departmental intervention.

167. In any case, when the unavailability of a government office during established business hours deprives a litigant of a statutory right to appeal within a set time period, Virginia law holds that the litigant is nonetheless entitled to "proceed as if [he] timely satisfied" the time limitation. *Hutchins*, 27 Va. App. at 614.

168. Wherefore, as an alternative to the relief requested above in paragraphs 123 and 130, Residents Brankley, Farooq, and Besa respectfully ask the Court to:

    (a) issue a writ of mandamus directing Mr. Gillies to transmit to the Board the Residents' November 18, 2024 Notice of Appeal, together with all papers constituting the record of his underlying October 18, 2024 determination;

    (b) award the Residents their reasonable costs in bringing this action; and

    (c) grant such additional relief as the Court deems just and proper.

IV.

Writ of Mandamus Against the Board:
Appeal of Mr. Gillies's October 18, 2024 Determination

169. The Residents incorporate by reference the allegations set forth above in paragraphs 1–83 and 142–167.

170. As discussed above in paragraphs 137–139, it is at best unclear whether Virginia law allows Mr. Gillies to make determinations concerning the scope of the Board's jurisdiction to review his decisions or to act on the Board's behalf in docketing matters before it.

171. To the extent that the ministerial duty to docket appeals belongs to the Board itself rather than to Mr. Gillies, and to the extent that the writ the Residents seek therefore lies against the Board in addition to or instead of Mr. Gillies, the Residents remain entitled to have their appeal docketed and heard in accordance with Virginia Code §§ 15.2-2311 – 15.2-2312.

172. Wherefore, as an alternative to the relief requested above in paragraphs 123, 130, and 168, Residents Brankley, Farooq, and Besa respectfully ask the Court to:

    (a) issue a writ of mandamus directing the Board of Zoning Appeals to place onto its active docket the Residents' November 18, 2024 Notice of Appeal of Mr. Gillies's October 18, 2024 determination, to set the matter for hearing, to issue all public notice required by law, and to decide the matter in accordance with Virginia Code § 15.2-2312;

    (b) award the Residents their reasonable costs in bringing this action; and

    (c) grant such additional relief as the Court deems just and proper.

V.

Writ of Mandamus Against Mr. Gillies:
Appeal of Mr. Smith's May 24, 2024 Determination

173. The Residents incorporate by reference the allegations set forth above in paragraphs 1–83.

174. As detailed above in paragraph 51, the Residents, Mr. Gillies, and the County Attorney's Office all agree that Deputy County Administrator Jesse Smith's May 24, 2024 action on the

Local Governing Body Certification Form constituted a determination under the Virginia Air Pollution Control Law rather than one "made . . . 'in the administration or enforcement of'" Virginia's zoning enactment law or any ordinance adopted thereunder.

175. To the extent, however, that Mr. Smith's May 24, 2024 action constituted a true "decision or determination made by an[ ] administrative officer in the administration or enforcement of" the County's Zoning Ordinance and was thus subject to appeal under Virginia Code § 15.2-2311, the Residents are entitled to have their timely-filed June 24, 2024 Notice of Appeal placed onto the Board's active docket and heard in accordance with law.

176. For the same reasons detailed above in paragraphs 99–106 and in their June 24, 2024 Notice of Appeal, the Residents were aggrieved by Mr. Smith's May 24, 2024 determination, and each of the Residents "has a sufficient interest in the subject matter" of the underlying request such "that the parties will be actual adversaries and the issues will be fully and faithfully developed." *Anders Larsen Trust*, 301 Va. at 121 (quoting *Cupp v. Fairfax County Board of Supervisors*, 227 Va. 580, 589 (1984)).

177. Wherefore, as an alternative to the relief requested above in paragraphs 123, 130, 168, and 172—and to the extent Mr. Smith's May 24, 2024 action constituted a true "decision or determination made by an[ ] administrative officer in the administration or enforcement of" the County's Zoning Ordinance subject to appeal under Virginia Code § 15.2-2311—Residents Brankley, Farooq, and Besa respectfully ask the Court to:

(a) issue a writ of mandamus directing Mr. Gillies to transmit the Residents' June 24, 2024 Notice of Appeal to the Board, together with all papers constituting the record of Mr. Smith's underlying May 24, 2024 determination;

(b) award the Residents their reasonable costs in bringing this action; and

(c) grant such additional relief as the Court deems just and proper.

VI.

Writ of Mandamus Against the Board:
Appeal of Mr. Smith's May 24, 2024 Determination

178. The Residents incorporate by reference the allegations set forth above in paragraphs 1–83 and 174–176.

179. As discussed above in paragraphs 137–139, it is at best unclear whether Virginia law allows Mr. Gillies to make determinations concerning the scope of the Board's jurisdiction over his decisions or to act on the Board's behalf in docketing matters before it.

180. To the extent that the ministerial duty to docket appeals belongs to the Board itself rather than Mr. Gillies, and to the extent that the writ the Residents seek lies therefore lies against the Board in addition to or instead of Mr. Gillies, the Residents are nonetheless entitled to have their June 24, 2024 appeal docketed and heard in accordance with Virginia Code §§ 15.2-2311 – 15.2-2312.

181. Wherefore, as an alternative to the relief requested above in paragraphs 123, 130, 168, 172, and 177—and to the extent Mr. Smith's May 24, 2024 action constituted a true "decision or determination made by an[ ] administrative officer in the administration or enforcement of"

the County's Zoning Ordinance subject to appeal under Virginia Code § 15.2-2311—Residents Brankley, Farooq, and Besa respectfully ask the Court to:

(a) issue a writ of mandamus directing the Board of Zoning Appeals to place onto its active docket the Residents' June 24, 2024 Notice of Appeal of Mr. Smith's May 24, 2024 determination, to set the matter for hearing, to issue all public notice required by law, and to decide the matter in accordance with Virginia Code § 15.2-2312;

(b) award the Residents their reasonable costs in bringing this action; and

(c) grant such additional relief as the Court deems just and proper.

Dated: January 13, 2025

Respectfully submitted,

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Counsel for the Petitioners

VERIFICATION UNDER VIRGINIA CODE § 8.01-644

In accordance with Virginia Code § 8.01-4.3, I verify under penalty of perjury that the forgoing is true and correct to the best of my knowledge upon reasonable inquiry.

Dated: January 13, 2025

Claire Marie Horan