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July 30, 2007

Via hand delivery and pdf email

Mr. Steve M. Hundley
Zoning Administrator
Town of Blacksburg
P.O. Box 90003
Blacksburg, Virginia 24062-9003

Board of Zoning Appeals
Town of Blacksburg
P.O. Box 90003
Blacksburg, Virginia 24062-9003

Mr. James E. Cornwell, Esq.
Sands, Anderson, Marks & Miller
New River Valley Office
250 South Main Street, Suite 226
Blacksburg, VA 24060-4860

Re: Fairmount Properties, LLC's and Fairmount University Realty Trust, LLC's Appeal of Vested Rights Determination by Steve M. Hundley, Zoning Administrator, June 18, 2007

Dear Mr. Hundley and Members of the Blacksburg Board of Zoning Appeals:

Please find enclosed a Brief in Support of the June 18, 2007 Zoning Administrator Determination of Vested Rights submitted by Blacksburg United for Responsible Growth ("BURG") and its members, Jane Aronson, Michael Aronson, Mary K. Goette, Mary M. Lough, Kathleen Huser, Emily Satterwhite, Phil Olson, Lisa Onega, Lucinda

Jennings, Robert Beaton, Jeanne Beaton, Jana Doyle, Mary Ross, Van Coble, Lauren Coble, Thomas Diller, Edward Hale, Daniel Breslau, Mark Lattanzi, Gregg Lustig, Ann Linden and Deb Young (hereinafter collectively "BURG").

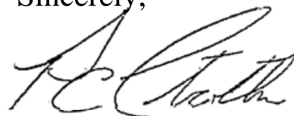
Also enclosed please find a letter of July 26, 2007 sent by Robert Allen of this office to Lawrence S. Spencer, Jr., Town Attorney, regarding BURG's concern about a potential conflict of interests in this matter for Dr. Patty Lobingier. We trust that our concerns will be handled appropriately.

We must also address the unfounded objection by Fairmount Properties, LLC and Fairmount University Realty Trust, LLC (together "Fairmount") to the participation by BURG and its individual members in this appeal. While the legal basis for Fairmount to make an objection to the involvement of another party is unknown, the Code of Virginia and the Town of Blacksburg BZA By-Laws clearly allow the involvement of BURG and its members in this appeal. As citizens of the Town and members of the public, BURG and its members are entitled to notice of BZA hearings pursuant to Va. Code § 15.2-2312. The BZA hearings are open to the public, "any private citizen" is entitled to speak and "any party" may submit material related to an appeal. BZA By-Laws Arts. 3-7, 4-3, 4-6 (Dec. 9, 1998).

Fairmount's misplaced reliance on Shilling v. Jimenez, 268 Va. 202 (2004), undermines the public notice and opportunity to be heard requirements expressly provided for by state law and local by-laws. Shilling involved a subdivision matter in which the Court held that a third party may not attack a subdivision approval indirectly by bringing a lawsuit against the developers as opposed to the locality. Shilling, 268 Va. at 204. The decision has absolutely no applicability outside of the subdivision process and especially has no place in zoning proceedings where the right of adjacent landowners to challenge zoning actions is well established by statute and supporting Supreme Court decisions. Va. Code § 15.2-2285(F) (2007); Riverview Farm Assocs. Va. Gen. Pshp. v. Board of Supervisors, 259 Va. 419, 528 S.E.2d 99 (2000); Cupp v. Board of Supervisors, 227 Va. 580, 318 S.E.2d 407 (1984); Board of Supervisors v. Fralin & Waldron, Inc., 222 Va. 218, 278 S.E.2d 859 (1981).

Thank you in advance for your careful consideration of our position.

Sincerely,



Philip Carter Strother
Counsel for BURG

Enclosures: as stated

cc: James K. Cowan, Jr., Esquire (via pdf email)
Gregory J. Haley, Esquire (via pdf email)
Lawrence S. Spencer, Jr., Esquire (via pdf email)
Joseph L. Anthony, Esquire (via pdf email)
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C. Richard Cranwell, Esquire (via pdf email)
Deborah Young
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V I R G I N I A :

IN THE BOARD OF ZONING APPEALS FOR THE TOWN OF BLACKSBURG

DIVERSIFIED INVESTORS XIII, LLC, FAIRMOUNT PROPERTIES, LLC, and LLAMAS, LLC, Petitioners, v. STEVE M. HUNDLEY, Zoning Administrator of the Town of Blacksburg, Virginia, Respondent.	)))))))))))))	BZA Hearing held on July 25, 2007

TO THE MEMBERS OF THE TOWN OF BLACKSBURG BOARD OF ZONING APPEALS:

BRIEF OF BLACKSBURG UNITED FOR RESPONSIBLE GROWTH, ET AL. ("BURG") IN SUPPORT OF THE JUNE 18, 2007 ZONING ADMINISTRATOR DETERMINATION OF VESTED RIGHTS

Jane Aronson, Michael Aronson, Mary K. Goette, Mary M. Lough, Kathleen Huser, Emily Satterwhite, Phil Olson, Lisa Onega, Lucinda Jennings, Robert Beaton, Jeanne Beaton, Jana Doyle, Mary Ross, Van Coble, Lauren Coble, Thomas Diller, Edward Hale, Daniel Breslau, Mark Lattanzi, Gregg Lustig, Ann Linden, Deb Young and Blacksburg United for Responsible Growth (hereinafter collectively "BURG"), by counsel, submit this Brief in Support of the June 18, 2007 Zoning Administrator Determination of Vested Rights ("Determination").

Nature of BURG's Involvement in these Proceedings

The BURG members are Blacksburg residents, many of whom own property, live and work adjacent to or near the parcels at issue in this appeal. As adjacent landowners and/or landowners in close proximity thereto, the BURG residents are interested parties

to this proceeding, entitled to notice pursuant to Va. Code § 15.2-2312, whose use and enjoyment of their property would be directly and adversely impacted by the Petitioners' proposed development and would suffer an actual or imminent, concrete and particularized injury as a result of the proposed development that includes, *inter alia*, a 176,000 square foot retail super center. In the event that the Determination is reversed in any way, the BURG residents will become aggrieved, having then an immediate, pecuniary and substantial interest in the litigation. Virginia Beach Beautification Com. v. Board of Zoning Appeals, 231 Va. 415 (1986). Their standing in this matter is unassailable under well established Virginia case law. Riverview Farm Assocs. Va. Gen. Pshp. v. Board of Supervisors, 259 Va. 419, 528 S.E.2d 99 (2000); Cupp v. Board of Supervisors, 227 Va. 580, 318 S.E.2d 407 (1984); Board of Supervisors v. Fralin & Waldron, Inc., 222 Va. 218, 278 S.E.2d 859 (1981). The BURG residents seek to offer their support of the Determination as permitted by Article 4-6 of the Board of Zoning Appeals ByLaws (Dec. 9, 1998) and make their position part of the record in the event that they decide to take appropriate legal action in the circuit court.

STATEMENT OF FACTS

On January 17, 2006, Diversified Investors XIII, LLC, Fairmont Properties, LLC, and Llamas, LLC, ("Petitioners") submitted a rezoning application ("Application") to the Town of Blacksburg's Planning and Engineering Department requesting that certain parcels, more particularly described in the Determination, be conditionally rezoned from Office and R-4, Low Density Residential, to General Commercial. The Application and related proposed proffered conditions were revised, amended and

considered several times through May 3, 2006, when the last proffer statement was submitted ("Proffer Statement"). On May 9, 2006, the Town Council adopted Ordinance 1412 that adopted the conditional rezoning.

The Petitioners' Application described a "mixed use town center" with "pedestrian-scaled storefronts, small-scale shopping". (Rezoning Application (May 4, 2006) at 6.) The Proffer Statement described the development as a "'main street' retail destination" with "casual elegance and a pedestrian-friendly, tree-lined boulevard" designed to enhance "the current Blacksburg Charm." (Revised Proffer Statement (May 3, 2006) at 1.) The development was proffered to be "atypical of … conventional shopping centers" and instead was described as a "varied and rich experience not found elsewhere in the New River Valley." (Id.)

As part of the Application, the Petitioners proffered for the property conditions including perimeter fences, landscaped buffers, traffic restrictions, limitations on building height and setbacks, limitations on residential density, the prohibition of six uses on the property that were not already prohibited, a commitment to "traditional neighborhood" design and an agreement for no cellular antennas or towers. (Revised Proffer Statement (May 3, 2006).) Among, the proffers made by the Petitioners are two that they later argue entitle them to vesting: identification of a multi-use path and a proposed contribution of $25,000 towards any improvements that are made to improve traffic flow resulting from the rezoning.

Following the rezoning, the Petitioners' proposed development underwent a dramatic transformation. (Compare Illustrative Plan of March 20, 2006 with Preliminary Site Plan of Jan. 10, 2007.) Significantly, the new development contained

a retail structure of 176,000 square feet with an associated vast parking lot. The Petitioners' post-rezoning development became the antithesis of the "main street retail" proposal presented to the Town Council in connection with the rezoning request and instead became a typical, conventional big box shopping center that would contribute nothing to Blacksburg's charm.

In the months that followed, the Petitioners requested that the Town's Planning and Zoning Department conduct preliminary reviews of pre-submittal site plans and the requests were granted as a courtesy. The Petitioners never submitted a preliminary site plan for the entire property to be reviewed by the Town before the subject Ordinance was enacted.

On March 27, 2007, the Town Council passed Resolution 3-G-07 that made certain findings regarding the substantial adverse impacts of retail establishments in excess of 80,000 square feet and instructed the Town Attorney to draft an amendment that would limit retail structures in excess of 80,000 square feet to the General Commercial District where they would be permitted by special use permit. On May 29, 2007, Ordinance 1450 was enacted which effectuated the amendment to the Zoning Ordinance.

The Petitioners did not apply for a special use permit but instead filed Civil Action CL07001697-00 in the Circuit Court for Montgomery County on May 10, 2007. The Petitioners also sought a determination of vested rights by the Zoning Administrator. For reasons that will not be reiterated here, Mr. Steve M. Hundley, Zoning Administrator, found that the Petitioners were subject to Ordinance 1450 and

had not obtained vested rights in the development on the property. The Petitioners then filed this Appeal.

ARGUMENT

Under the facts of this case, the Code of Virginia affords the Petitioners no vested rights in the development containing the 176,000 square feet retail establishment and the Petitioners are therefore subject to the special use requirements of Ordinance 1450 and must obtain a special use permit if they wish to include a retail establishment in excess of 80,000 square feet on the subject property.

I. The Petitioners do not satisfy the three-prong test for vested rights under Va. Code § 15.2-2307 and their attempt to seek protection under the statute is misplaced

Pursuant to Va. Code § 15.2-2307, a landowner obtains vested rights in a land use that would not be subject to subsequent amendments to the zoning ordinance if three conditions exist:

> (i) the landowner obtains a "*significant affirmative governmental act* which remains in effect allowing development of *a specific project,*"
> (ii) the landowner relies *in good faith* on the significant affirmative governmental act, and
> (iii) "incurs extensive obligations or substantial expenses in diligent pursuit of *the specific project* in reliance on the significant affirmative governmental act."

Va. Code § 15.2-2307 (2007) (emphasis added). A landowner must satisfy all three requirements in order to have vested rights.

A. Petitioners have not obtained any significant affirmative governmental act allowing for the development of the specific project containing the 176,000 square feet retail establishment

Critical to a determination of vested rights under § 15.2-2307 is the existence of a "significant affirmative governmental act which remains in effect allowing

development of a specific project." The terms are not defined in the statute, and so under the rules of statutory construction, we must rely on their plain meanings. Significant is defined as "having meaning; having or likely to have influence or effect." Webster's Ninth New Collegiate Dictionary 1096 (1990). Affirmative means "asserting that the fact is so; favoring or supporting a proposition or motion." Id. at 61. Taken as a whole, the act must be one that authorizes the landowner to move forward with the development.

During the course of their site plan development, the Petitioners sought the assistance and input of the Zoning Administrator, and now seek to turn his courtesies against him, claiming his assistance constitutes significant affirmative governmental acts. Not to take away from the kind assistance of the Zoning Administrator, but his letters to the Petitioners were neither significant within the meaning of the Code nor affirmative, and the Petitioners' reliance on the letters is clearly misplaced. On January 11, 2007, the Petitioners sought the interpretation of two proffered designs that affected just a portion of the property as they continued to work on a final site plan for submission. (Letter from Cowan to Hundley of Jan. 11, 2007.) The Zoning Administrator provided the Petitioners with several answers but stated that "the submitted plan does not comply with several of the other proffers." (Letter from Hundley to Cowan of Jan. 22, 2007 at 2.) In a subsequent letter, in response to a request for a preliminary review of a presubmittal site plan, the Zoning Administrator informed the Petitioners that the "buffer yard adjacent to Beeks School does not appear to comply with the proffer condition" and informed the Petitioners of several other problems related to vehicle entrance alignment, use and design standards, and parking

lot tree islands. (Letter from Hundley to Howard of Feb. 9, 2007 at 1-2.) On February 23, 2007, the Petitioners again sought the input of the Zoning Administrator with the understanding "that a full site plan review is required." (Letter from Howard to Hundley of Feb. 23, 2007.) Once again, the Zoning Administrator pointed out no less than six aspects of the site plan that were not in compliance with the proffers. (Letter from Hundley to Howard of Mar. 6, 2007.)

Petitioners' argument that these letters entitle them to assert vested rights is disingenuous. It is obvious from the letters that the Petitioners had not developed a site plan that was in compliance with the proffers. The Zoning Administrator's letters were not affirmative; instead the letters pointed out the numerous deficiencies in the preliminary, presubmittal site plans or portions of the site plans. The analysis of vested rights under Va. Code § 15.2-2307 should stop here because the Petitioners cannot point to an affirmative governmental act that allows development of a specific project.

The letters by the Zoning Administrator are not significant within the meaning of the statute. The General Assembly has provided examples of what constitutes a "significant affirmative governmental act allowing development of a specific project." Va. Code § 15.2-2307 (2007). Virginia is a late vesting state and the Petitioners have not come close to obtaining the majority of the acts considered sufficient for vested rights, e.g., approval of a preliminary site plan with diligent pursuit of the final plan, or approval of a final site plan. The Petitioners here did not even submitted a preliminary site plan for the portion of the site where the 176,000 square foot structure would be

located and for which they ask for approval prior to the enactment of Ordinance 1450.[1] Instead, in misplaced reliance on the conditional rezoning and the Zoning Administrator's letters, the Petitioners claim that two examples in §15.2-2307 apply to their situation. They do not.

As a preliminary matter, the examples provided by the General Assembly in §15.2-2307 must relate to "development of a specific project." Here the developers have obtained a rezoning that allows 55 by right uses, (Zoning Administrator Determination June 18, 2007 at 4) and have made clear that their proposal is simply "one example of a possible concept" for the development and that retailer response will ultimately dictate the site plan. (Rezoning Application (May 4, 2006) at 5.) The Petitioners' discussions with the Zoning Administrator do not relate to a "specific project" entitling them to vested rights in any specific project.

In 1997, the Virginia Supreme Court set forth the general requirement that:

> A landowner who asserts a vested property right to a particular zoning classification must identify a significant governmental act permitting the landowner the particular use of its property that otherwise would not be allowed. Holland v. Board of Supervisors, 247 Va. 286, 289, 441 S.E.2d 20, 21-22 (1994) (other citations omitted). The requirement of a significant governmental act creates a bright line test that enables the landowner to determine the point at which it has acquired the vested right. Holland, 247 Va. at 292, 441 S.E.2d at 23.

Town of Rocky Mount v. Southside Investors, 254 Va. 130, 132 (1997) (where developer did not submit a site plan for additional construction, the Supreme Court found no vested rights in the development). In effect, vested rights protect a landowner who has received governmental approval in the form of a

[1] The Petitioners submitted a site plan application on May 4, 2007. On June 27, 2007, the Zoning Administrator denied approval of Phase I that does not include the big box. The developers have filed their resubmission on July 24, 2007.

specific, identifiable act, for a specific project from future zoning changes as long as he diligently pursues the specific project. See Bd. of Supervisors v. Greengael, L.L.C., 271 Va. 266, 282 (2006). In 1998, the General Assembly amended § 15.2-2307 to clarify the requirement, but the key requirement continues to be the existence of a "significant affirmative governmental act."

The Petitioners are unable point to any single affirmative act by the Town that allows development of the specific project involving the 176,000 square foot retail establishment. In this case, there has been no acceptance of proffers "which specify use related to a zoning amendment." See Va. Code § 15.2-2307. The Petitioners' proffers only eliminate six uses that are not otherwise allowed on the property, leaving 55 possible uses. (Revised Proffer Statement (May 3, 2006) at 5; Zoning Administrator Determination (June 18, 2007) at 4.) See Rocky Mount, 254 Va. at 133 ("A significant governmental act, as contemplated by our decisions set forth above, authorizes the specific use to be made of the property, rather than the general categories of development allowed in a given zoning classification.")

Neither has there been acceptance of proffers "which specify use or density." See id. The Petitioners also do not specify density of the property as a proffer. The Proffer Statement sets a maximum density for residential use, (Rezoning Application (May 4, 2006) at 6), but the later site plans do not appear to include any residential units. (Ordinance Compliance Plan (Feb. 23, 2007).) Moreover, there is no density whatsoever specified for the commercial use, that comprises the vast majority of the proposed development.

The Petitioners do not fall under any of the examples provided by the General Assembly and can point to no affirmative governmental act that rises to the significance required for vested rights in Virginia. The Petitioners have not satisfied the requirements of the first of three requirements for standing under Va. Code § 15.2-2307.

B. <u>Petitioners also fail to show the existence of good faith and extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act</u>

The Petitioners have not established that they have relied on the Zoning Administrator's letters, even if they were affirmative, or the conditional rezoning, in good faith. It has also not been shown that the Petitioners have incurred extensive obligations or substantial expenses in diligent pursuit of any specific project. To the contrary, the record reveals that the Petitioners' effort has been on shifting the project from the original plan presented to the Town Council to a dramatically different project that continues to change. For these reasons, even if a significant affirmative governmental act is found to exist, this Board should not find that the Petitioners have satisfied the remaining requirements for vested rights.

C. <u>The Virginia Supreme Court's decision in *City of Suffolk v. Suffolk Bd. of Zoning Appeals* does not support the Petitioners' argument</u>

The Virginia Supreme Court has repeatedly ruled that no vested rights exist where no site plan has been approved. <u>Town of Rocky Mount v. Southside Inv., Inc.</u>, 254 Va. 130, 487 S.E.2d 855 (1997); <u>Board of Supervisors of Chesterfield County v. Trollingwood Partnership</u>, 248 Va. 112, 445 S.E.2d 151, (1994). The Attorney General of Virginia has recently confirmed that "the filing of a site plan of development does not create a vested property interest in a land use classification" and clarified that §

15.2-2307 specifies the "*approval* of the preliminary site plan 'as the earliest point in the overall process when vesting may occur.'" Opinion of Robert F. McDonnell, Attorney General, 2006 Va. AG LEXIS 38 (Oct. 19, 2006) (emphasis in original) citing In re Zoning Ordinance Amendments Enacted by the Loudoun County Bd. of Supervisors, 66 Va. Cir. 375 (Loudoun Cir. Ct. 2005). Rocky Mount and Trollingwood are consistent with the general rule that "the mere reliance on a particular zoning classification, whether created by ordinance or variance, creates no vested right in the property owner." Snow v. Amherst County Board of Zoning Appeals, 248 Va. 404, 408, 448 S.E.2d at 606, 608-09 (1994).

The Petitioners rely almost entirely on the case of City of Suffolk ex rel. Herbert v. Bd. of Zoning Appeals for Suffolk, 266 Va. 137 (2003), to support their efforts to obtain vested rights in spite of the fact that they have not even submitted a preliminary site plan. This reliance is entirely misplaced. In City of Suffolk, the landowner obtained a significant affirmative governmental act that is simply not present in this case.

In City of Suffolk, the landowner obtained a rezoning to Planned Development Housing ("PD-H") and received approval of the Master Land Use Plan for 164 acres. Id. at 141. Six years later, the landowner requested and obtained a rezoning of a portion of the property and an amendment to the Master Land Use Plan which fixed the density for 154-acres at 4 units per acre and the number of available residential units on the property. Id. Later the landowner submitted a preliminary recreation plan and a traffic impact analysis which the city approved. Id. The planning commission also approved the preliminary plat and granted the landowner an extension of time to file the

final plat. Id. During this approval process, significantly, the landowner also deeded 1.1 acres to Virginia Department of Transportation for road improvements adjacent to the property. Id. at 142. The landowner submitted a final plat at the time the city enacted the ordinance changing the zoning classification of the property. Id. By the narrowest of majorities, the Supreme Court held that under the circumstances the rezoning was directed towards a specific project with designated and limited uses, established densities and site plans for highway entrances, recreational areas and the like. Id. at 146. Three justices dissented, arguing that the landowner only had vested rights in the portion of the property covered by the preliminary subdivision plat that was approved by the city. Id. at 153.

Conversely, in this case, the Petitioners' property was rezoned to Conditional General Commercial allowing for 55 potential uses. The Petitioners have not obtained formal approval for any site plan, master land use plan, and nor did they receive any extension to file such plans before Ordinance 1450 was enacted. The Petitioners have also not made any dedication of property in connection with the proposed development. Most importantly, the rezoning in this case, does not limit the use or density or the specific project to the extent that the rezoning and plan approvals did in City of Suffolk. Without a site plan approval, the Petitioners are unable to bypass the well established rule that a zoning classification creates no vested right and a landowner has no vested rights in the continuation of his property's existing zoning status. Snow, 248 Va. at 408; In re Zoning Ordinance Amendments, 66 Va. Cir. at 378.

II. Petitioners are afforded no protection under Va. Code § 15.2-2298(B)

Alternatively, the Petitioners seek to characterize their Proffer Statement in such a way that it would fall within the scope of Va. Code § 15.2-2298(B). Section 15.2-2298(B) makes subsequent zoning changes ineffective with respect to a rezoning involving a restricted class of proffers and provides that:

> In the event proffered conditions include a requirement for the dedication of real property of substantial value, or substantial cash payments for or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself, then no amendment to the zoning map for the property subject to such conditions, nor the conditions themselves, nor any amendments to the text of the zoning ordinance with respect to the zoning district applicable thereto initiated by the governing body, which eliminate, or materially restrict, reduce, or modify the uses, the floor area ratio, or the density of use permitted in the zoning district applicable to the property, shall be effective with respect to the property unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare.

Va. Code § 15.2-2298(B) (2007).

For the statute to apply, several factors must be present that are absent in this case. First, the need for the proffers must not be generated solely by the rezoning. Second, there can be no mistake, fraud or change in circumstances substantially affecting the public health, safety, or welfare. Third, the proffered conditions must include the "dedication of real property of substantial value, or substantial cash payments for or construction of substantial public improvements".

In this case, the statute is inapplicable for several reasons. Most of the Petitioners' proffers involve fences, buffers, traffic restrictions, building setbacks and height limitations which are clearly not the category of proffer contemplated by the General Assembly under § 15.2-2298(B). The Petitioners attempt to convince this Board that the multi-use path and the $25,000 contribution for any improvements to the

intersection of Country Club Drive and Airport Road should entitle them to the protection afforded by the statute. This argument is unpersuasive.

None of the proffers qualify because of a material change in circumstances substantially affecting the public health, safety and welfare. The development proposed by the Petitioners at the time the proffer plan was submitted is vastly different than the site plan they now attempt to force through. The Town Council made factual determinations that a retail establishment over 80,000 square feet is a different project than other smaller, "main street" retail establishments. In particular, the Council has found that large-scale retail establishments "can result in *substantial* impacts to the community, including noise, traffic congestion, and loss of local character", "can impose additional demands on public facilities and services", and "are inconsistent with the goal contained in the Comprehensive Plan of maintaining a small town atmosphere". (Resolution 3-G-07) (emphasis added). Such factual determinations are entitled to legislative deference and must be sustained if fairly debatable. Narrows v. Clear-View Cable TV, Inc., 227 Va. 272, 280 (1984). The specific, identifiable project that was incorporated into the conditional rezoning and the Proffer Statement is different than the specific project that the Petitioners seek to exclude from the coverage of Ordinance 1450. The new project includes a 176,000 square foot retail use that the Town Council has determined is a use requiring a special use permit because it substantially affects the public health, safety, and welfare, and is significantly different from the small scale retail uses, like those proposed in the Petitioners' original plan. As a result, the Petitioners are not entitled to be afforded vested rights in the new project

involving the 176,000 square foot retail establishment due to the change in circumstances substantially affecting the public health, safety and welfare.

Additionally, the cash payment fails to satisfy the requirements for protection under § 15.2-2298(B) because the need for the cash payment is generated solely by the rezoning. The Petitioners have proffered that they will perform and submit a final traffic study whenever they submit a site plan application (they have not yet done so) to study, among other things, the service impacts on Country Club Drive and will contribute $25,000 to the Town of Blacksburg to provide "a roundabout or other traffic calming measures or other intersection improvements to improve traffic flow at this location." (Revised Proffer Statement (May 3, 2006) at 7.) The need for these improvements is generated solely by the rezoning and is further magnified by the 176,000 square foot retail establishment that "can result in substantial impacts to the community, including …traffic congestion." Whether a cash payment is substantial depends on the circumstances, but the BURG residents urge this Board to find that a conditional payment of just $25,000 is trivial in relationship to a project of this magnitude. Moreover, the BURG residents question whether the cash payment has ever been made.

The multi-use path proposed in the Proffer Statement is also outside of the scope of § 15.2-2298(B) because it is not a "dedication of real property of substantial value". The General Assembly chose the term "dedication" rather than reservation or designation, and therefore nothing less than a dedication of real property will do. "Dedication" means the "donation of land or creation of an easement for public use." Black's Law Dictionary, abridged, 7d., at 337. Unlike the simple indication that a

certain part of the parcel could be used for a path, as the Petitioners have done, dedication of real property involves a transfer of property. The statute provides that:

> In the event proffered conditions include the dedication of real property… the property shall not transfer … until the facilities for which the property is dedicated …[is] included in the capital improvement program.

Va. Code § 15.2-2298(A) (2007). It is apparent that the General Assembly contemplates a transfer of property as a requirement for protection under the statute. Further, elsewhere in the Code, the General Assembly confirms that dedication requires the transfer of property: "'Dedication' means the transfer to the Commonwealth of an estate, interest, or right in a natural area…." Va. Code § 10.1-209 (2007). The reason behind this requirement is simple. If the real property that was dedicated as a proffer was not actually transferred to the locality, the proffer would be rendered meaningless by a simple sale of the entire property and the locality would be left with nothing. The Petitioners' proffer to "place" a multi-use path on the property is not a dedication and is completely inadequate to fall with the safe harbor of § 15.2-2298(B) which properly applies to landowners who have proffered a transfer of property in good faith reliance on a zoning action and who should therefore be entitled to protection against future rezonings.[2] See, e.g., City of Suffolk, 266 Va. 137 (2003).

III. The substantial changes in the development at the time of the Proffer Statement and rezoning and the continually evolving site plans defeat any entitlement to vested rights

[2] The Petitioners contend that the intent to place a path on the property for public use qualifies as a dedication for purposes of Va. Code § 15.2-2298(B). Their argument would be that the parking lots are also dedications because they are planned for use by the public, connected to the public road system and conform to the Town's standards. The extension of the Petitioners' argument illustrates why their position is without merit and further demonstrates why dedication requires a transfer of property.

Though codified in Virginia, the concept of vested rights is, at its core, an equitable remedy, akin to equitable estoppel. In the area of real property law, vested rights protect from future land use actions a landowner who has obtained prior approval from the government for a specific project and then, in diligent pursuit of the project, expends substantial money in good faith reliance on the prior governmental act. Vested rights prevent the unfair, inequitable situation for such a landowner that would arise if subsequent land use actions could supercede the prior one that the landowner was relying on in good faith. In the vested rights statutes, the General Assembly has incorporated the chancery fundamental principles that a person seeking an equitable remedy must come to court with "clean hands." See, e.g. Va. Code § 15.2-2307 (requires "good faith" reliance on significant affirmative governmental act); Va. Code § 15.2-2998(B) (provides an exclusion where there has been mistake, fraud, or certain changes in circumstances).

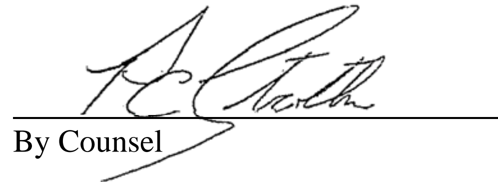
The BURG residents do not now suggest there has been mistake or fraud, but assert that vested rights should not be extended a landowner who obtains an rezoning by representing one project to the governing body, and then after the rezoning, changes the project presented in the site plans to one that is vastly different and one that the governing body has found to have characteristics that substantially affects the public health, safety and welfare. These are the facts presented in this case, and the BURG residents urge this Board to find that vested rights do not apply to the Petitioners' latest proposal that now includes a 176,000 square foot retail establishment.

CONCLUSION

WHEREFORE BURG and its individual members respectfully request that this Board affirm the June 18, 2007 Zoning Administrator Determination of Vested Rights.

Respectfully submitted,

BURG AND ITS INDIVIDUAL MEMBERS



By Counsel

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July 30, 2007

Via U.S. Mail, facsimile & email
Lawrence S. Spencer, Jr., Town Attorney
Town of Blacksburg
300 South Main Street
Blacksburg, VA 24062-9003

Re: Fairmount Properties, LLC's and Fairmount University Realty Trust, LLC's Appeal of Vested Rights Determination by Steve M. Hundley, Zoning Administrator, June 18, 2007

Dear Mr. Spencer:

As you know, this firm represents Blacksburg United for Responsible Growth ("BURG"), a group of Blacksburg citizens who support the June 18, 2007 Determination of the Zoning Administrator.

It has been recently brought to my attention that Dr. Patty Lobingier, an alternate member of the BZA, was on the steering committee for Citizens Against 1450, a group opposed to Ordinance 1450. *See* Citizen Against 1450 webpage at http://www.stop1450.org/images/ad01.pdf.

We are confident that you will ensure that no BZA member with an inappropriate conflict of interests will act on the above referenced appeal. We will not receive the disclosure statements requested by our Freedom of Information Act request of July 18, 2007, until after the scheduled vote on this appeal, and consequently we must request written confirmation from you that each member of the BZA who will participate in this transaction has no personal interest in the matter or other reason for disqualification under the State and Local Government Conflict of Interests Act, VA. CODE § 2.2-3100 *et seq*. Further, we ask that you advise whether or not Dr. Lobingier will participate. Given the perceived conflict of interests, we strongly suggest that Dr. Lobingier should disqualify herself.

I ask that you kindly ensure that this letter is made a part of the official BZA record for this appeal.

Please do not hesitate to contact me if you would like to discuss this matter further.

Very truly yours,

Robert J. Allen

cc: James E. Cornwell, Jr. (via mail and email)
Town of Blacksburg Board of Zoning Appeals (via mail and facsimile)
Philip Carter Strother
Deborah Young