

STROTHER LAW OFFICES, PLC

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RECEIVED

JUL 17 2007

Planning & Engineering
Department

Philip Carter Strother
Robert J. Allen
Audrey J. Burges
David J. Fishman – of Counsel*

Richmond
Delaplane
*Admitted in VA, FL and KY

July 16, 2007

Via hand delivery

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

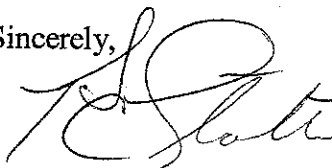
Re: Fairmount Properties, LLC's and Fairmount University Realty Trust, LLC's Appeal of Vested Rights Determination by Steve M. Hundley, Zoning Administrator, June 18, 2007

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

Please find enclosed an Appeal of a Decision by the Zoning Administrator with a check for \$100 to cover the filing fee.

Please do not hesitate to contact me if you have any questions or require further information.

Sincerely,



Philip Carter Strother
Counsel for BURG

For Office Use:
BZA Case #:

Date:

Town of Blacksburg, Virginia Appeal of a Decision by the Zoning Administrator

Please contact the Planning and Engineering Department at (540) 961-1114 for the application deadline. This application and accompanying information must be submitted in full before the case may be referred to the Board of Zoning Appeals for consideration.

Name of Property Owner(s): 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

Address: c/o Philip Carter Strother, Esq., Strother Law Offices PLC, The Hillyard-Maury House, 15 East Franklin Street, Richmond, Virginia 23219

Home Phone: **Work Phone:** (804) 523-2000

Fax # (if applicable): (804) 523-2008 **E-mail Address (if applicable):** pstrother@strotherlaw.com

Contract Purchaser or Agent: Fairmount Properties LLC, and Fairmount University Realty Trust, LLC (both of 2618 Moreland Blvd., Cleveland, OH 44120), contract purchaser and developer

Address: c/o James K. Cowan, Jr., Esq., LeClair Ryan, 2000 Kraft Drive, Suite 1000, Blacksburg, VA 24060

Home Phone: (540) 961-2941 **Work Phone:** (540) 443-3300

Fax # (if applicable): (540) 961-2941 **E-mail Address (if applicable):** james.cowan@leclairryan.com

Location or Address of Property in Question: West of South Main Street, East of Kennedy Avenue, North of Hubbard Street, South of Country Club Drive

Tax Parcel Number(s): 287-A-41A; 287-A-27; 287-A-27A; 287-A-28; 287-A-28A; 317-A-7

APPEAL OF INTERPRETATION TO SECTION(S): Please see attached letter for specific enumeration of sections of the Blacksburg Zoning Ordinance.

What decision did the Administrator make of which you are aggrieved?

Please see the attached letter.

What decision do you believe should have been made and why?

Please see the attached letter.

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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:

This firm represents Blacksburg United for Responsible Growth ("BURG") and its individual members. BURG is an organization whose membership is largely comprised of interested citizens who own parcels of land adjacent to the South Main Street property at issue in the above matter. These citizens, as well as the public at large, are entitled to an opportunity to be heard at the Board of Zoning Appeals ("BZA") meeting at which this matter will be discussed. As an organization comprised of interested individuals with the right to participate in this meeting, BURG wishes to respond to the fourteen (14)-point letter of July 3, 2007, submitted by counsel for Fairmount Properties, LLC, and Fairmount University Realty Trust (together "Fairmount") to the BZA.

Fairmount's letter noting its appeal of the Zoning Administrator's determination primarily restates the allegations made in its Complaint in the Circuit Court of Montgomery County, Virginia, that was dismissed for Fairmount's failure to exhaust administrative remedies. The fourteen alleged "grounds for appeal" consist largely of conclusory statements that are unsupported by statute or case law.

1. Fairmount first complains about the Zoning Administrator's "characterization of the various documents." Aside from the proffers, it is impossible to discern which "various documents" Fairmount believes were mischaracterized. In any event, it is irrelevant because the Zoning Administrator clearly referenced each document he deemed relevant and probative. The documents speak for themselves and Fairmount's vaguely expressed displeasure with the Zoning Administrator's description of various documents is not actionable and would not support a reversal of the Zoning Administrator's well reasoned determination.

2. Fairmount's second allegation is unsupported by any statutory or judicial authority and fails to specify which conclusion of law are alleged to be incorrect or what legal authority contradicts the conclusions. Inclusion of this entirely conclusory ground for appeal illustrates Fairmount's across the board, shotgun-style appeal strategy.

3. Fairmount's third ground fails for several significant reasons. Of primary significance is the fact that Va. Code § 15.2-2298(B) is completely inapplicable to this matter, and it is because of that section's inapplicability that the Zoning Administrator correctly determined that no vested rights had arisen under that section.

a. Fairmount's proffered conditions did not "include a requirement for the dedication of real property of substantial value," nor did it include any "substantial cash payments for or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself." The "Request for a Chance of Zoning Classification" form completed by Fairmount includes the following express instruction:

PROFFERED CONDITIONS, IF ANY MUST:

- 1. Have a reasonable relationship to the rezoning;*
 - 2. Not include a cash contribution to the Town;*
 - 3. Not include a mandatory dedication of property; and*
 - 4. Not include payment for construction of off-site improvements.*
- The rezoning must give rise to the need for the conditions and the conditions must be related to the physical operation of the property and be in conformity with the Comprehensive Plan.*

If the conditional zoning method is desired to be used by the applicant, the following conditions are voluntarily proffered.

These instructions specifically prohibit proffered conditions submitted by the applicant for a rezoning from including *any* condition that would trigger the application of Va. Code § 15.2-2298. Below these instructions, Fairmount's application referred to its attached, amended proffers. Fairmount in no way indicated that its proffered conditions – including the proposed "multi-use path" or conditional contribution of \$25,000 for necessary "traffic calming measures" (dependent on the results of a traffic study and "consultation with the surrounding neighborhood") – did not comply with these express instructions. Its

recharacterization of these proposals as “dedications” after the Zoning Administrator’s determination is disingenuous.

The multi-use path mentioned in the proffered conditions was never characterized in Fairmount’s Rezoning Application as an addition to the Town trail system, and was apparently not ever designed with the requirements of that system in mind. The \$25,000 claimed by Fairmount as a “substantial cash payment” was included in the proffer only as a conditional sub-part of the “Final Traffic Study” portion of the proffer, and the rezoning would have given rise to the need for the payment.

b. Second, even if Section 15.2-2298(B) were relevant to this discussion, the determination of whether it applied to Fairmount was the Zoning Administrator’s to make. Va. Code 15.2-2286(4)(iii). Moreover, Virginia Code § 15.2-2299 vests the Zoning Administrator with “all necessary authority on behalf of the governing body of the locality to administer and enforce conditions attached to a rezoning or any amendment to a zoning map.”

c. Third, Section 15.2-2298(B) includes language which further limits its applicability, providing that if there has been “mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare,” the subject property will not have protection from subsequent rezonings. Fairmount’s proposed “traditional neighborhood design” drastically changed after it succeeded in obtaining a rezoning of the subject property. Its proffered conditions originally included a provision that “retail and commercial structures will have their frontage on any Street changed in [setback, facing materials, color, or roofline] not more than every sixty (60) feet.” The first small-scale line drawings Fairmount submitted to the Zoning Administrator on January 11, 2007, included a Preliminary Site Plan which showed a varied-setback building including four distinct retail spaces. The same footprint and four-space building appeared in preliminary plans dated January 26, 2007. Then, Anderson and Associates submitted a site plan on February 23, 2007, which had morphed this building into a single “Block H” of 176,000 square feet.

This drastic transformation in the proposed building’s character is at best a mistake or change in circumstance, at worst, a deliberate misrepresentation constituting fraud. It is certainly a change in circumstances substantially affecting the public health, safety, and welfare. Fairmount originally enticed the public with a “mixed-use development that will have an image-focused architectural character, and a variety of delightful public spaces...” including “pedestrian-scale storefronts” and “small-scale shopping” that was “sensitive to the character and concerns” of adjacent neighborhoods. Subsequently, it located a superstore adjacent to a neighborhood elementary school, and created a building footprint that was the functional antithesis of the “delightful public space” included in its application for rezoning. A clearer application for the limiting language included in Va. Code § 15.2-2298(B) can hardly be conceived.

d. Fourth, had the Town received any proffered funds in accordance with Va. Code § 15.2-2298, or even if such funds had been promised, Va. Code § 15.2-2303.2 would have required those funds to be reported to the Commission on Local Government with an allocation as to the method by which they would be expended. The fact that no such report was made underscores the fact that the funds had not been received, were not “proffered,” and bore no resemblance to the gratuitous and community-minded characterization made by Fairmount only after the Zoning Administrator’s determination.

4. Fairmount’s fourth ground for appeal relies entirely on its conveniently timed recharacterization of the proffered conditions. As discussed above, this claim is disingenuous. Fairmount never characterized the fifteen-foot “multi-use path corridor” as a portion of the Town’s trail system until after the Town passed Zoning Ordinance 1450. This path, the details for which were never solidified, and for which no easement was ever proposed, was only portrayed as a “dedication of real property” or “substantial public improvement” after the Town’s passage of the zoning amendment in an apparent effort to trigger the safe harbor of Va. Code § 15.2-2298.

5. Similarly, it is insincere for Fairmount to characterize the proposed “traffic calming measure” of \$25,000 for traffic improvements (*if* revealed as necessary by the final traffic study and consultation with the neighborhood) as a “substantial cash payment for or construction of substantial public improvements, the need for which is not generated solely by the rezoning.” Fairmount’s fifth ground for appeal, like its fourth ground, seeks to bootstrap its proposed site plan into Section 15.2-2298.

6. Fairmount’s sixth ground for appeal is clearly contradicted by the law and the facts of this matter that show the Zoning Administrator properly found that Fairmount did not have vested rights under Va. Code § 15.2-2298(B), which claim is discussed above. It then claims that Va. Code § 15.2-2307 should have limited the application of Ordinance 1450 to the subject property. As discussed below, Section 15.2-2307 is similarly inapplicable to this matter.

7. In crafting its seventh ground for appeal, Fairmount ignores the first prong of the three-prong test contained in Section 15.2-2307 that limits its applicability to the situation where a landowner “obtains or is the beneficiary of a significant affirmative governmental act *which remains in effect* allowing development of a specific project” (emphasis added). No such act occurred. Fairmount has also failed to prove any good faith reliance on the significant affirmative governmental act or that it has incurred “extensive obligations or substantial expenses in diligent pursuit of the specific project.”

8. Fairmount’s eighth ground for appeal implies that the “governing body [had]...accepted proffers or proffered conditions which specify use related to a zoning amendment.” This contention is contradicted by the zoning amendment itself, as well as by Fairmount’s own application for rezoning and proffered conditions. The proffered conditions related expressly to a “possible *concept*” for the site’s use. The “possible concept” did not include only one use, but a proposed “mixed use” development which, as correctly noted by the Zoning Administrator, only excluded eight possible uses permitted in a General Commercial zone, leaving 55 possible uses by right. Characterizing a condition with 55 possible uses as “specific” in an effort to contend that

Fairmount's hazy plans, which were never approved by the Town, are "vested" would be contrary to the law and common parlance. *See generally, Board of Supervisors of Culpeper County v. Greengael, LLC*, 271 Va. 266, 626 S.E.2d 357 (2006).

9. The proffer statement does not specify a use for which the subject property would be developed, and the Zoning Administrator correctly concluded so. After submitting proposals replete with caveats that proposed plans were "for illustrative purposes only," noting in its application for rezoning that its "concept plan ... represents one *example* of a possible *concept* that fully responds to the Comprehensive Plan" (emphasis in original), and noting repeatedly in its correspondence that it was only in the process of "work[ing] to finalize a site plan for submission for your review," Fairmount now seeks to convince this Board that the proposed concepts specified a use for the subject property. Having played a hazy "mixed-use development" as its face card while holding its true intent close to the vest, Fairmount contends that its proffered conditions sufficiently specified use sufficient to trigger application of 15.2-2307. This contention is contrary to the law.

10. The Town has not approved a preliminary site plan or plan of development for the subject property, in contradiction to Fairmount's tenth ground for appeal. Each submission by Fairmount included the caveat that the plans were "illustrative" only, and that Fairmount was in the process of working to create a site plan for review, not that it had already done so. Moreover, each draft plan submitted had noted deficiencies by which failed to conform to the proffered conditions, and the Zoning Administrator noted those deficiencies by letter.

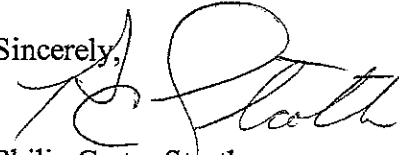
11. Fairmount's contention that the Zoning Administrator should have found that the remaining requirements of Va. Code § 15.2-2307 were satisfied is without merit. The second and third requirements of Section 15.2-2307 are dependent on the existence of a substantial governmental act. In this case, there was no significant governmental act which renders the other requirements moot. Since there was no significant affirmative governmental act, there can be no "good faith" reliance on any such act (let alone the absence of good faith demonstrated by Fairmount, as discussed above). Further, any extensive obligations or substantial expenses alleged to have been incurred by Fairmount cannot be "in diligent pursuit of the specific project *in reliance on the significant affirmative governmental act*" when there was no such significant governmental act.

12. It is a fundamental tenet of land use law that a landowner has no vested property right in the continuation of the land's existing zoning status. *See, e.g., Board of Zoning Appeals v. CaseLin Systems, Inc.*, 256 Va. 206, 210, 501 S.E.2d 397, 400 (1998). Therefore, a landowner's land is subject to subsequent rezonings unless his rights in a previous zoning ordinance are vested. As more particularly described in the paragraphs above, Fairmount has no vested rights in the proposed development of the subject property, and Fairmount's property is subject to Ordinance 1450 and limited to 80,000 square feet for any retail facility, unless it obtains a special use permit. The Zoning Administrator was correct in so finding.

14. BURG objects to the inclusion every allegation made in its previously filed Complaint at this time in this administrative appeal process and preserves its right to respond to the claims made in the Complaint at a later date if necessary.

BURG urges this Board to affirm the determination of the Zoning Administrator.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Strother". The signature is written in a cursive style with a large initial "P" and a long horizontal stroke.

Philip Carter Strother
Counsel for BURG

cc: Deborah Young
Robert J. Allen
Audrey J. Burges

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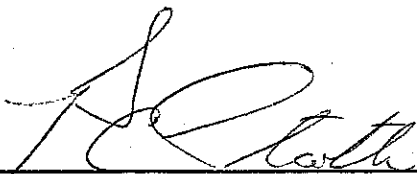
Please see the attached letter.

5. **The following items must accompany this application:**

1. A copy of the section of the zoning map indicating the parcel(s) which would be affected by the decision of the Board of Zoning Appeals and any other supporting documents.
2. A vicinity map (may be combined with the other map required).
3. A list of adjacent property owners including properties across the street and their addresses, and the cost for first class postage for notifying each adjacent property owner. As of 2003, cost per notification is \$0.37 but this amount is subject to change.
4. A fee of \$500 to be applied to the cost of advertising and expense incidental to reviewing, publishing, and processing this application. Please make your check or money order payable to the **Town of Blacksburg**.
5. Any item submitted that is in excess of 11" x 17" paper size or in color requires thirty-six (36) copies.

In response to Part 5, subparts 1-5, enumerated above, the above-stated Property Owners aver that these requirements have been satisfied by James Cowan, Esq., as counsel for LLAMAS, LLC, Fairmount Properties, LLC, and Fairmount University Realty Trust, LLC. The Property Owners refer to and incorporate by reference any and all exhibits, zoning map(s), vicinity map(s), list(s) of adjacent property owners, and any other materials submitted by Mr. Cowan on behalf of LLAMAS, LLC, Fairmount Properties, LLC, and Fairmount University Realty Trust, LLC. Upon information and belief, a list of adjacent property owners and their addresses has been submitted at the time of Mr. Cowan's appeal of July 3, 2007, and the list includes several of the Property Owners listed above. This matter has already been referred to the Board of Zoning Appeals for the Town of Blacksburg for consideration, and the case has been set for a public hearing on July 25, 2007, at 4:30 p.m. The above-mentioned Property Owners seek to participate in said hearing as aggrieved persons, as more particularly described in the letter attached hereto.

Please sign here after you have read and completed this application. If you have any other questions please contact the Town Planning and Engineering Department at (540) 961-1114.



Signature of Applicant, by counsel

7-16-07

Date