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May 31, 2007

HAND DELIVERED

The Honorable Allen C. Burke, Clerk
Montgomery County Circuit Court
P. O. Box 6309
1 E. Main Street
Suite B-5
Christiansburg, VA 24068-6309

Re: *Diversified Investors XII, LLC, Fairmount Properties, LLC and Llamas, LLC v.
The Town Council of the Town of Blacksburg, Virginia, the Town of Blacksburg,
Virginia,
and
Steven M. Hundley, in his capacity as Zoning Administrator of the Town of
Blacksburg, Virginia
Case No. CL07-1697*

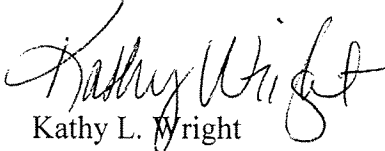
Dear Mr. Burke:

Enclosed for filing is a Special Plea and Demurrer, and a Notice of Hearing with regard to the above-styled case.

As always, thank you for your assistance in this matter.

Very truly yours,

GENTRY LOCKE RAKES & MOORE, LLP


Kathy L. Wright

KLW:aem
Enclosure

cc: C. Richard Cranwell, Esquire (w/enc.)
Kevin P. Oddo, Esquire (w/enc.)
James K. Cowan, Jr., Esquire (w/enc.)
Joseph L. Anthony, Esquire (w/enc.)

9441/8/2156969v1

VIRGINIA

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY

DIVERSIFIED INVESTORS XIII, LLC,)
)
 FAIRMOUNT PROPERTIES, LLC,)
)
 and)
)
 LLAMAS, LLC,)
)
 Plaintiffs,)
)
 THE TOWN COUNCIL OF THE TOWN OF)
 BLACKSBURG, VIRGINIA,)
)
 THE TOWN OF BLACKSBURG, VIRGINIA,)
)
 and)
)
 STEVE M. HUNDLEY, Zoning Administrator,)
 Town of Blacksburg, Virginia,)
)
 Defendants.)

Case No.: CL07-001697-00

TOWN OF BLACKSBURG’S SPECIAL PLEA AND DEMURRER

The Town Council of the Town of Blacksburg, the Town of Blacksburg, Virginia, and Steve M. Hundley, Zoning Administrator (collectively the “Town”), by counsel, state the following as their Special Plea and Demurrer and to the plaintiffs’ Complaint.

SPECIAL PLEA

The Complaint must be dismissed because the plaintiffs have not exhausted the administrative remedy specifically provided for the purpose of determining vested rights for the future development of property, and therefore do not have standing to make a judicial attack by a declaratory judgment action with respect to the potential application of an ordinance in the future.

1. The General Assembly has enacted administrative provisions to establish specific procedures for the orderly determination of whether a developer has established a vested right with respect to the future development of property. The plaintiffs seek to avoid the established procedures through this declaratory judgment proceeding.

2. The procedure for determining a landowner's vested right for the future development of property is specifically provided for in the Code of Virginia and the Town of Blacksburg Zoning Ordinance. Virginia Code Ann. § 15.2-2286(A)(4) and Zoning Ordinance § 1200(b)(9) provide for the Zoning Administrator to make findings of fact, and, with the concurrence of the Town Attorney, conclusions of law requiring determinations of vested rights to engage in future development activities. Furthermore, in appropriate circumstances, the site development plan review process may require making a determination of vested rights.

3. The Zoning Administrator's vested rights determination is subject to appeal to the judicially appointed Town of Blacksburg Board of Zoning Appeals pursuant to Zoning Ordinance §§ 1241(a) and 1243 and Code of Virginia §§ 15.2-2309(1) and 15.2-2311(A). Zoning Ordinance § 1241(a) specifically provides that the Board of Zoning Appeals shall have the power and duty to decide appeals from any written order, requirement, decision or determination made by an administrative officer in the administration or enforcement of the Zoning Ordinance.

4. The Board of Zoning Appeals' action on the appeal of a Zoning Administrator's determination can itself be appealed to the Circuit Court pursuant to Zoning Ordinance § 1245 and Code of Virginia § 15.2-2314.

5. Virginia law requires that a party seeking to challenge the application of a zoning ordinance to its development activity must exhaust the administrative remedies available. It does not matter whether the available administrative remedy involves discretion or includes a

cumbersome and inconvenient procedure. See, Board of Supervisors v. Market Inns, Inc., 228 Va. 82, 87, 319 S.E.2d 737, 740 (1984) (declaratory judgment request dismissed when plaintiff failed to exhaust an administrative remedy that provided the same relief sought in the court action); Gayton Triangle Land Co. v. Board of Supervisors, 216 Va. 764, 766-7, 222 S.E.2d 570, 572-3 (1976).

6. In Gayton Triangle Land Co., the Court specifically held that when a landowner claims a zoning ordinance is invalid as applied to his property, he must exhaust adequate and available administrative remedies before attacking the ordinance through a declaratory judgment action. 216 Va. at 766, 222 S.E.2d at 572. A locality's zoning power cannot be fully applied without completion of the administrative procedure. Id. at 767, 222 S.E.2d at 573.

7. In this case, the plaintiffs' challenge is based on the proposed ordinance's application to their proposed development; the available administrative process provides exactly the determination the plaintiffs seek – a determination of their claimed rights related to the future development of the property. The plaintiffs' procedural strategy of seeking a declaratory judgment action, rather than requesting a determination of vested rights by the Zoning Administrator, creates the risk of simultaneous judicial and administrative proceedings involving the issue of whether a vested right for future development activity has been established.

8. Courts do not make decisions based on circumstances that may never arise. Id.; 222 S.E.2d at 572. If the zoning administrator makes a determination in favor of the plaintiffs, the situation on which the Complaint is based may never occur. The plaintiffs' assumption that the zoning administrator's decision would be contrary to their interests is conjecture. See Market Inns, 228 Va. at 86, 319 S.E.2d at 740.

9. The plaintiffs do not have standing to request declaratory judgment as to the existence or extent of any vested rights until they have exhausted the administrative remedy specifically provided to answer questions regarding vested development rights. Id., 228 Va. at 86, 319 S.E.2d at 739-40 (“A party complaining of the impact of a zoning ordinance on his property rights has no standing to make a judicial attack upon the validity of the ordinance until he has exhausted the administrative remedies available to him.”); Gayton Triangle Land Co., 216 Va. at 766-67, 222 S.E.2d at 572.

10. The plaintiffs may cite the case of Holland v. Johnson, 241 Va. 553, 403 S.E.2d 356 (1991), for the proposition that zoning administrators are not authorized to adjudicate property rights. In Holland, the Court based its analysis on the absence of a statute authorizing a zoning administrator to make determinations of vested rights with respect to future development activity. The General Assembly amended Va. Code Ann. § 15.2-2286(A)(4) in 1993 to authorize zoning administrators to make vested rights determinations. See Chapter 672, 1993 Va. Acts of Assembly.

WHEREFORE, this Court should sustain the Town’s Special Plea of lack of standing and failure to exhaust administrative remedy, and dismiss this action without leave to amend, and grant such further relief as is just and proper.

DEMURRER

The Town, pursuant to Virginia Code § 8.01-273, demurs to the plaintiffs’ Complaint because it does not state a cause of action and fails to allege facts upon which the relief demanded could be granted.

For purposes of analyzing a demurrer, a circuit court must consider the truth of all properly pleaded material facts. In addition, all reasonable factual inferences fairly and justly drawn from

the facts alleged must be considered in aid of the pleading. However, a demurrer does not admit the correctness of the pleader's conclusions of law. Wards Equipment, Inc. v. New Holland North America, Inc., 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997) (holding that factual allegations in a complaint need not be accepted as true for the purpose of demurrer when those allegations are refuted by the actual contract language).

COUNTS I and II

1. The Declaratory Judgment Act grants circuit courts the authority to make "binding adjudications of right" when there is an "actual controversy" with an "antagonistic assertion and denial of right." See, Va. Code Ann. §8.01-184. Circuit courts do not have the authority to render advisory opinions, decide moot questions, or respond to speculative inquiries. USAA Casualty Ins. Co. v. Randolph, 255 Va. 342, 346, 497 S.E.2d 744, 746 (1998). A circuit court must also be discrete in determining when it is appropriate to consider action in a declaratory judgment proceeding. "The authority to enter a declaratory judgment is discretionary and must be exercised with great care and caution." Id.

2. The Complaint fails to state a cause of action for declaratory judgment because there is no actual controversy. There has been no antagonistic assertion and denial of right as required by the Declaratory Judgment Act.

a. The Town's Zoning Administrator has not made a determination of vested rights with respect to the plaintiffs' proposed project as provided for in § 1200(b)(9) of the Town's Zoning Ordinance and Va. Code Ann. § 15.2-2286(A)(4).

b. The Plaintiffs allege in Paragraph 25 of the Complaint that the Town Planning Director stated that the development would not acquire vested development rights until the final site plan had been approved. Pursuant to Virginia Code § 15.2-2286(A)(4) and Zoning

Ordinance 1200(b)(9), only the Zoning Administrator is authorized to make a determination of vested rights for the future development of property. The Zoning Administrator, pursuant to Zoning Ordinance § 1200(a), is appointed by the Director of Planning and Engineering and administers and enforces the Zoning Ordinance. The alleged statement of a different Town employee does not establish an actual antagonistic assertion and denial of right necessary to state a cause of action for declaratory judgment.

c. The Complaint does not allege that Steve M. Hundley, as the Zoning Administrator, has determined that the plaintiffs have no vested right to develop the project pursuant to Virginia Code §15.2-2286(A)(4) and Zoning Ordinance §1200(b)(9).

d. The Plaintiff's Complaint alleges that Defendants have taken the position that Ordinance 1450 will apply to the shopping center project. Complaint, ¶ 28. The allegation appears to be based on an interpretation of an e-mail message from one Council member to citizens writing in favor of the project. Complaint, ¶¶ 24, 28. An e-mail message by one Council member does not establish the actual antagonistic assertion and denial of right necessary to state a cause of action for declaratory judgment.

3. The Complaint is speculative and inappropriate for declaratory judgment. The Court does not have jurisdiction to consider a declaratory judgment motion when there is no actual controversy. See, Fairfax v. Shanklin, 205 Va. 227, 229, 135 S.E.2d 773, 775 (1964) (holding declaratory judgment inappropriate when the motion was based on speculation of some possible future damage).

4. The Complaint also fails to allege facts necessary to establish a significant affirmative government act of approval as required by Virginia Code §15.2-2307. Section 15.2-2307 provides that an act is deemed to be a significant affirmative governmental act when "the

governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment.” (Emphasis added). The Town’s Zoning Ordinance specifies the uses of land permitted in each zoning district. The Proffer Statement (Complaint, Exhibit B) does not specify the use to which the land will be put or the nature of the development. The Proffer Statement allows the Plaintiffs to develop the property for any of the uses allowed in the General Commercial District under Zoning Ordinance § 3151. The Proffer Statement identifies eight uses that are not permitted as part of the future development (Adult Entertainment Establishments, Adult Stores, Automobile Repair Services, Car Washes, Gasoline Stations, Funeral Homes, Commercial Kennel, and Pawn Shops). See Proffer Statement, Paragraph 5. Even after these “Restricted Uses”, Zoning Ordinance § 3151 allows, as a matter of right, 27 “Commercial” uses, 18 “Civic” uses, three “Office” uses, and single family, two family and multi-family residential uses. A copy of the General Commercial District Regulations is attached as Exhibit 1.

When the allegations of a pleading are contradicted by the terms of unambiguous documents that are properly part of the pleadings, the Court may ignore the incorrect factual allegations. Wards Equipment, 254 Va. at 382, 493 S.E.2d at 518. In this case, the proffering of eight “Restricted Uses”, while leaving available an additional 51 uses permitted by right under Zoning Ordinance § 3151 is not a specific use within the meaning of Va. Code Ann. § 15.2-2307.

5. (a) Virginia Code Ann. §15.2-2307 provides that a significant affirmative governmental act occurs when “the governing body or its designated agent has approved a preliminary subdivision plat, site plan or plan of development for the landowner’s property and the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances.”

(b) The Complaint does not allege that the Town has approved the plaintiffs' site development plan as provided for in Zoning Ordinance § 5110. To the contrary, the Complaint alleges that the Town has not yet approved the plaintiffs' site development plan. See Complaint, ¶¶ 17, 25. The letters attached to the Complaint as Exhibits C through H are, on their faces, requests for preliminary reviews of specific items and responses tailored to the specific requests. This correspondence does not qualify as Town approval of a site plan.

6. The Complaint fails to allege facts necessary to establish a vested right for future development activity pursuant to Va. Code Ann. § 15.2-2298.

(a) The Complaint alleges that Llamas agreed to a proffered condition requiring construction of a public improvement to construct a multi-use path that will be dedicated to public use by easement. See Complaint, ¶ 10. The plaintiffs' Proffer Statement, however, does not require or provide for the dedication of an easement for the multi-use path. The Proffer Statement does not describe the multi-use path as a "public improvement." See Complaint, Exhibit B, Proffer Statement, ¶ 4.

(b) The Complaint alleges that Llamas agreed to pay a \$25,000 cash proffer to the Town for the cost of intersection improvements. See Complaint, ¶ 10. The language of the Proffer Statement shows that any such contribution is uncertain and contingent on future events that may not occur including the approval of the Town and consultation with the surrounding neighborhood with respect to any possible future improvements. See Complaint, Exhibit B, Proffer Statement, ¶ 9(b). Also, the Complaint does not allege facts to establish that the possible future cash contribution in the amount of \$25,000 is substantial within the meaning of Va. Code § 15.2-2298(B). Whether a proffered condition is "substantial" necessarily depends on the

evaluation of the surrounding facts and circumstances including the total size and cost of the project. See 1991 Opinion of the Attorney General 63, 1991 Va. AG LEXIS 64 (copy attached).

7. The Complaint fails to allege that Plaintiffs have exhausted the administrative remedy specifically provided for a determination of vested rights for the future development of property. The Complaint fails to allege facts upon which the demanded relief could be granted.

WHEREFORE, the Town requests that the Court sustain this Demurrer, dismiss the Complaint without leave to amend, and grant such further relief as is just and proper.

COUNT III

Count III fails to allege facts upon which the extraordinary writ of mandamus could be granted.

8. The Complaint does not allege that the plaintiffs have complied with the pre-litigation notice requirements of Virginia Code § 8.01-644. Section 8.01-644 allows an application for a writ of mandamus “after the party against whom the writ is prayed has been served with a copy of the petition and notice of the intended application a reasonable time before such application is made.” The Complaint does not allege that prior notice was given to either the Town or the Zoning Administrator, as required by § 8.01-644.

9. The plaintiffs do not have a clear legal right to have their site development plan review completed within 15 days of its May 4, 2007, filing. Zoning Ordinance § 5110(f) provides that approval or disapproval of a site development plan by the Zoning Administrator shall occur within sixty days of the filing of a complete application. See also Va. Code Ann. § 15.2-2258 (providing that site plans and plans of development required under the zoning statutes shall be subject to the provisions of § 15.2-2259) and 15.2-2259 (providing that the review agent shall act on a proposed plan within sixty days after it has been officially submitted for approval by either

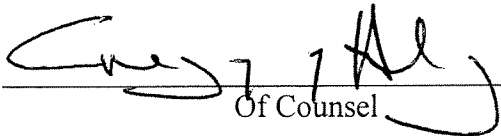
approving or disapproving the plan in writing and giving with any disapproval specific reasons therefor).

10. The Town's general policy of reviewing site development plans within 15 days of formal and complete submittal applies to typical development projects. The plaintiffs' project is substantially larger and more complex than the typical site development plan. It would be extraordinarily difficult, if not impossible, for the Town to complete its review of the plaintiffs' site development plan within 15 days of formal submission given the scope and complexity of the project, the other development projects for other developers already under review, and the availability of professional staff.

11. Mandamus may only be issued where there is a clear and specific legal right to be enforced... it is never granted in doubtful cases." Legum v. Harris, 205 Va. 99, 102, 135 S.E.2d 125, 128 (1964) (emphasis added) (holding plaintiff had not adequately proved that damage to his home was caused by the Highway Department and was not entitled to mandamus to force condemnation proceedings). In Ancient Art Tattoo v. City of Virginia Beach, 263 Va. 593, 561 S.E.2d 690 (2002), the Supreme Court held that an applicant had no legal right enforceable by a mandamus action to have a land use decision made in less time than the ninety day period provided for by statute. Id. at 599-600, 561 S.E.2d at 693. The Complaint does not seek to compel the performance of a clear legal duty. Rather it seeks to have this Court elevate a practice with respect to typical site development plan review to the level of an ordinance and order that plaintiffs' site development plan be given special preferential treatment.

WHEREFORE, the Town requests that the Court sustain this Demurrer, dismiss Count III without leave to amend, and grant such further relief as is just and proper.

TOWN COUNCIL OF THE TOWN OF BLACKSBURG,
THE TOWN OF BLACKSBURG, VIRGINIA, AND
STEVE M. HUNDLEY, ZONING ADMINISTRATOR

By:  _____
Of Counsel

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(540) 983-9300 Telephone
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CERTIFICATE OF SERVICE

I certify that on this 31 day of May, 2007, a true and correct copy of the forgoing Special Plea and Demurrer was served by facsimile and first-class mail on:

C. Richard Cranwell, Esquire
Cranwell, Moore & Emick, P.L.C.
P. O. Box 11804
Roanoke, Virginia 24022-1804

Counsel for Diversified Investors XIII, LLC

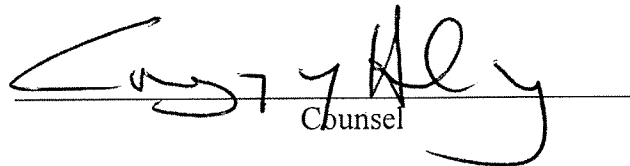
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Roanoke, Virginia 24011

Counsel for Llamas, LLC


Counsel

(e) The Historic or Design Review Committee shall review the site plans and make recommendations to the applicant for amendments to achieve consistency with this section. These recommendations are advisory only. It is not mandatory that the applicant comply with the recommendations of this committee.

(Ord. No. 1215, § 20, 5-11-99)

Sec. 3144 Maximum Residential Occupancy.

The maximum dwelling unit occupancy shall be a family, plus two persons unrelated to the family; or no more than four unrelated persons.

DIVISION 15. GENERAL COMMERCIAL DISTRICT

Sec. 3150 Purpose.

The General Commercial district is designed for a variety of commercial uses, both pedestrian and automobile oriented. The intent of the district is to provide for more intense commercial uses than the Downtown Commercial district, but in a manner which is consistent with the town's character. Modern "strip" commercial development is not in keeping with the small-town character of Blacksburg, and this district is intended to discourage such development. Instead, a vital and lively streetscape, created by commercial buildings with windows and entrances oriented to the street, is an important goal of this district.

Sec. 3151 Permitted Uses.

(a) The following uses and structures are permitted by right subject to all other applicable requirements contained in this Ordinance:

Residential

Single-family, Detached

Civic*

Administrative Services

Community Recreation

Cultural Services

Day Care Center

Educational Facilities, Primary/Secondary

Educational Facilities, College/University

Home for Adults

Laboratory

Life Care Facility

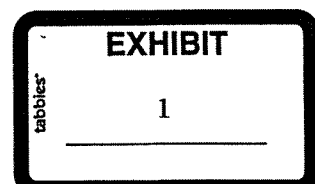
Nursing Home

Open Space

Post Office

Public Parks and Recreational Areas

Public Recreation Assembly



Religious Assembly
Safety Services
Shelter
Utility Services, Minor

Office*

Financial Institutions
General Office
Medical Office

Commercial*

Adult Entertainment Establishment
Adult Store
Automobile Repair Services
Automobile Renting/Leasing
Automobile Parts/Supply, Retail
Bed & Breakfast
Business Support Services
Car Wash
Clinic
Commercial Indoor Entertainment
Commercial Indoor Amusement
Commercial Indoor Sports and Recreation
Communication Services
Construction Sales and Services
Consumer Repair Services
Funeral Home
Garden Center
Gasoline Station
Grocery Store
Hospital
Hotel/Motel
Itinerant Vendor
Kennel, Commercial
Neighborhood Convenience Store
Parking Facility
Pawn Shop
Personal Improvement Services
Personal Services
Restaurant, Fast Food
Restaurant, General
Restaurant, Small
Retail Sales
Specialty Shop

Studio, Fine Arts
Veterinary Hospital/Clinic

Miscellaneous
Accessory Structures

*Without external speakers only. Any use which incorporates an external speaker may be permitted only with a special use permit.

(b) The following uses may be permitted with a Special Use Permit:

Civic
Public Assembly
Utility Services, Major

Commercial
Automobile Dealership
Commercial Outdoor Recreation
Commercial Outdoor Entertainment
Dance Hall
Equipment Sales/Rental
Mini-Warehouse
Restaurant, Drive-in

Industrial
Custom Manufacturing
Transportation Terminal

Miscellaneous
Broadcasting and Communication Facility (Ord. No. 1170, adopted 11-11-97)

(c) Residential uses are permitted by right on upper floors of multi-story buildings, and in basements of structures in the General Commercial District:

Residential Use Types
Two Family Dwelling
Multi-family Dwelling
Home Occupation

(Ord. No. 1215, § 21, 5-11-99; Ord. No. 1278, § 5, 11-13-01; Ord. No. 1339, § 29, 9-9-03; Ord. No. 1340, § 2, 8-12-03)

Sec. 3152 Site Development Standards.

- (a) Minimum lot size: 15,000 square feet
- (b) Minimum street frontage: 30 feet
- (c) Minimum Setbacks (Ord. No. 1184, adopted 6-9-98)
 - front: 10 feet

rear:	None
side:	None, except on corner lots, a side yard facing the street shall be 10 feet or more
(d) Maximum Residential Density:	48 bedrooms per acre
(e) Maximum Lot Coverage:	85% by impervious surfaces
(f) Maximum Structure Height:	60 feet; 70 feet with additional one foot front, side, and rear setback per foot of additional height.

(g) The street elevation of principal structures shall have at least one street-oriented entrance, and contain the principal windows of the structure, with the exception of structures in a courtyard style.

(h) All roof-top equipment shall be enclosed in building materials that match the structure or which are visually compatible with the structure.

(i) Automobile entrances to the site shall be minimized and placed in such a way as to maximize safety, maximize efficient traffic circulation, and minimize the impact on the surrounding area. A maximum of two curb cuts shall be allowed per street frontage. Factors including the number of existing curb cuts in the area, the potential for increased traffic hazards and congestion, and the number of travel lanes of the street that serves the site shall be used to determine the number of curb cuts permitted.

(j) Except where specifically excepted, outside storage of materials such as but not limited to tools, supplies, materials, or equipment, shall be screened in compliance with the requirements of Article V, Division 3.

(k) All utility lines, electric, telephone, cable television lines, etc., shall be placed underground.

(Ord. No. 1247, § 11, 9-12-00; Ord. No. 1308, § 8, 8-13-02)

Sec. 3153 [Reserved].

Sec. 3154 Joint and Cross Access.

(a) These provisions will provide adequate driveway spacing along commercial corridors and reduce the potential for strip commercial development along the major roads of the Town.

(b) Adjacent commercial properties that generate 100 trips or more per day according to the Institute of Transportation Engineer's *Trip Generation Manual*, shall provide a cross access drive to allow circulation between sites. The Administrator or Town Council, as appropriate, may modify or waive the requirements of this section where the characteristics or layout of abutting properties would make development of a unified or shared access and circulation system impractical.

(c) A system of joint use driveways and cross access easements shall be established along all streets designated as "collector" or greater and the building site shall incorporate one or more of the following:

- (1) Service drive connections or cross access corridors between sites preferably visible from the street; a design speed of 10 mph and sufficient width to accommodate two-way travel aisles designed to accommodate automobiles, service vehicles, and loading vehicles;
- (2) Stub-outs and other design features to show that the abutting properties may be tied in to provide cross-access via a service drive;
- (3) A unified access and circulation system plan that includes coordinated or shared parking areas is required where practicable.

(d) Applicants for a building permit, site plan shall:

- (1) Record an easement allowing cross access to and from other properties served by the joint use driveways and cross access or service drive; and
- (2) Record an agreement with the Town that remaining access rights along the public road will be dedicated to the Town and pre-existing driveways will be closed and eliminated after completion of the joint-use driveway; and
- (3) Record a joint maintenance agreement defining maintenance responsibility of adjoining property owners.

(e) The Zoning Administrator or Town Council, as appropriate, may reduce required separation distance of access points where they prove impractical, provided all of the following requirements are met:

- (1) Joint access driveways and cross access easements are provided wherever feasible in accordance with this section.
- (2) The site plan incorporates a unified access and circulation system in accordance with this section.
- (3) The property owner has entered into a recorded agreement with the Town, that pre-existing connections on the site will be closed and eliminated after completion of each side of the joint use driveway.

Sec. 3155 Maximum Residential Occupancy.

The maximum dwelling unit occupancy shall be a family, plus two persons unrelated to the family; or no more than four unrelated persons.

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1991 Va. AG LEXIS 64, *; 1991 Op. Atty Gen. Va. 63

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF VIRGINIA

1991 Va. AG LEXIS 64; 1991 Op. Atty Gen. Va. 63

August 19, 1991

CORE TERMS: zoning, proffer, proffered, rezoning, formula, landowner, conditional, developer, off-site, locality, zoning ordinance, zoning district, governing body, public improvements, cash contribution, regulations, factual determination, real property, land use, implemented, dedication, density, urban, enact, map, vested right, contemplates, proposed development, form of government, comprehensive plan

REQUESTBY:

[*1] The Honorable Vincent F. Callahan, Jr.
Member, House of Delegates
P.O. Drawer 1173
McLean, Virginia 22101

OPINIONBY:

Mary Sue Terry, Attorney General

OPINION:

You ask whether certain proffers of cash and off-site road improvements by a Fairfax County developer qualify for the protections of § 15.1-491(a1) of the Code of Virginia.

I. Facts

In December 1990, the Board of Supervisors of Fairfax County approved a rezoning in the Fairfax Center area of the County for a 24-acre office development project. Written conditions proffered by the developer at the time of the rezoning included (1) certain off-site road improvements with an estimated cost of \$ 3,028,000, and (2) a \$ 500, 000 cash contribution to be used by Fairfax County for other specified off-site improvements (the "proffers"). Performance of the proffers is tied to the progress of the development. The \$ 500,000 cash contribution is payable in quarterly installments beginning in March 1991, before the developer submitted site plans.

You indicate that the developer made the proffers to satisfy a formula utilized by Fairfax County staff in evaluating rezoning applications for projects exceeding the base level density allowed by the County's **[*2]** comprehensive plan. This formula, known as the Fairfax Center Area Roadway Contribution Formula (the "Formula") is included in *Procedural Guidelines for the Annual Review Process: Fairfax Center Area (the "Guidelines")* that the County adopted in 1982 as part of its annual comprehensive plan review process. These *Guidelines* established the Formula to determine the proportionate share of transportation improvements in the Fairfax Center area that should be provided by the private sector. This Formula includes an inflation-sensitive multiplier and allows developers a cash credit for the dedication and construction of qualifying off-site road improvements. The *Guidelines* also provide that the Formula does not relate to "on-site" road improvements, which are the sole responsibility of the developer.

EXHIBIT

2

tabbles

As applied to the office development in question, the Formula currently requires a total cash contribution of \$ 3,699,603. The proffered off-site road improvements and cash contribution, which together total \$ 3,528,000, will be credited as provided by the Formula.

II. Applicable Statutes

Virginia's zoning enabling statutes are detailed in Article 8, Chapter 11 of Title [*3] 15.1, §§ 15.1-486 through 15.1-498. Section 15.1-486 authorizes local governing bodies to enact zoning ordinances classifying the territory under their jurisdiction into districts and regulating the use of land within those districts.

As a county with the urban county executive form of government, Fairfax County is authorized to enact conditional zoning provisions pursuant to § 15.1-491(a). n1 Conditional zoning is intended to provide a flexible mechanism to permit differing land uses and to recognize the effects of changing land use pattern, while protecting the community by permitting zoning reclassifications subject to conditions proffered by a zoning applicant that are not generally applicable to other land similarly zoned. See §§ 15.1-491.1, 15.1-430(q). n2

----- Footnotes -----

n1 The conditional zoning process in most Virginia localities is described in §§ 15.1-491.1 to 15.1-491.6. See 1989 Att'y Gen. Ann. Rep. 90, 92 n.1. Conditional zoning under § 15.1-491 (a) is independent and distinct from conditional zoning implemented under §§ 15.1-491.1 to 15.1-491.6. 1989 Att'y Gen. Ann. Rep., *supra*. Section 15.1-491(a) applies to a limited number of localities specified in the statute. 1989 Att'y Gen. Ann. Rep., *supra*.

[*4]

n2 Section 15.1-430(q) defines "conditional zoning," "as part of classifying land within a governmental entity into areas and districts by legislative action," to mean "the allowing of reasonable conditions governing the use of such property, such conditions being in addition to, or modification of [,] the regulations provided for a particular zoning district or zone by the overall zoning ordinance."

----- End Footnotes -----

Section 15.1-491(a) provides that a zoning ordinance may include "reasonable" regulations and provisions

for the adoption, in counties . . . wherein the urban county executive form of government is in effect . . . as part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by § 15.1-493 by the owner of the property which is the subject of the proposed zoning map amendment. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in [*5] effect until a subsequent amendment changes the zoning on the property covered by such conditions.

In 1990, the General Assembly amended § 15.1-491(a) to restrict a county governing body's ability to change the applicable zoning regulations once qualifying proffered contributions of cash, property or public improvements have been provided in compliance with a statutory

prescribed timetable. n3 See Ch. 868, 1990 Va. Acts 1501, 1502 (Reg. Sess.). As a result, § 15.1-491(a) is now modified by § 15.1-491(a1) and (a2), as follows:

(a1) 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 [*6] district applicable to such property, shall be effective with respect to such property unless there has been mistake, fraud, ora a change in circumstances substantially affecting the public health, safety, or welfare.

(a2) Any landowner who has prior to July 1, 1990, proffered 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, but who has not substantially implemented such proffers prior to July 1, 1990, shall advise the local governing body by certified mail prior to July 1, 1991, that he intends to proceed with the implementation of such proffers. Such notice shall identify the property to be developed, the zoning district, and the proffers applicable thereto. Thereafter, any landowner giving such notice shall have until July 1, 1995, substantially to implement such proffers, or such later time as the governing body may allow. Thereafter, the landowner in good faith shall diligently pursue the completion of the development of the property. Any landowner who complies with the requirements of this subdivision shall be entitled [*7] to the protection against action initiated by the governing body affecting use, floor area ratio, and density set out in subdivision (a1), unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare, but any landowner failing to comply with the requirements of this subdivision shall acquire no rights pursuant to this section. n4

----- Footnotes -----

n3 Section 15.1-491(a), of course, contemplates that proffers shall be voluntary. *Rinker v. City of Fairfax*, 238 Va. 24, 29, 381 S.E.2d 215, 217 (1989). In most localities, § 15.1-491.2 expressly prohibits consideration of proffers of cash contributions and offsite road improvements as part of the conditional zoning process, even if voluntarily made. See 1989 Att'y Gen. Ann. Rep. 90, 92 & 96, 97, 99. Section 15.1-491.2:1, however, expressly authorizes certain high-growth and contiguous localities to accept proffers of property or cash made in compliance with the statute. See 1989 Att'y Gen. Ann. Rep., *supra*, at 94-95. Localities authorized to enact conditional zoning provisions pursuant to § 15.1-491(a) are not subject to the general statutory prohibition against consideration of cash and property proffers under § 15.1-491.2 See 1989 Att'y Gen. Ann. Rep., *supra*, at 95 n.1 (noting that with enactment of § 15.1-491.2:1, zoning enabling statutes provide for three distance types of conditional zoning).

[*8]

n4 Subdivision (a3) of § 15.1-491 provides that subdivisions (a1) and (a2) apply prospectively only and do not affect zoning ordinance amendments enacted before March 10, 1990, or litigation pending before July 1, 1990.

----- End Footnotes -----

III. Qualification for Statutory Protections Requires Evaluation of Facts and Surrounding Circumstances

Section 15.1-491(a1) represents a legislative determination that certain landowners should receive protections comparable to those provided to a landowner who has acquired vested rights to complete a project, notwithstanding later zoning or other legislative changes. See 1989 Att'y Gen. Ann. Rep. 32, 34. Like the determination of the vested rights of a landowner, application of the protections of § 15.1-491(a1) depends upon the facts of each case. See 1989 Att'y Gen. Ann. Rep., *supra*.

The protections of § 15.1-491(a1) require a threshold determination that the proffered conditions of a rezoning application include a requirement for "**substantial**" contributions of cash, real property or public improvements, "the need for which is not generated solely by the rezoning [***9**] itself." n5

----- Footnotes -----

n5 Section 15.1-491(a2) imposes further requirements for the implementation of proffers made before July 1, 1990, that have not been substantially implemented before that date. A landowner who made such a proffer must timely notify the locality by July 1, 1995, unless the governing body allows an extension. You indicate that the conditions in question were proffered in December 1990, at the time the rezoning application was approved, which would render § 15.1-491(a2) inapplicable.

----- End Footnotes-----

I am unable to determine from the facts presented whether the proffered conditions of the particular rezoning application you describe satisfy the criteria for application of the protections of § 15.1-491(a1). Whether the proffered contributions are "**substantial**" necessarily depends on an evaluation of all the relevant surrounding facts and circumstances, including the total size and cost of the project. Similarly, whether the need for the proffered contributions for off-site road improvements is created solely by the rezoning [***10**] also requires an evaluation of the attendant facts and circumstances, including other projects in the area and their likely impact on traffic volume. Expert testimony on complex urban planning and economic issues may be needed to apply these statutory tests properly.

Conditions proffered to satisfy the Formula may or may not satisfy needs generated solely because of the rezoning, depending on the surrounding facts and circumstances. For example, to satisfy the Formula, a developer might offer to upgrade traffic signals at a nearby intersection as a condition of rezoning for a shopping center or office project. Whether the need for the upgrading was generated solely by the rezoning would be a factual determination to be made on a case-by-case basis. n6 It is my opinion, however, that the mere fact that conditions are proffered to satisfy a formula adopted by the Fairfax County Board of Supervisors and used by the County staff in evaluating rezoning applications is not, by itself, determinative. n7

----- Footnotes -----

n6 Any administrative determination in accepting or interpreting a particular proffer would be subject to judicial review, of course, in the event a dispute arises requiring a binding adjudication whether an owner has acquired a vested right in a land use. See *Holland v. Johnson*, 241 Va. 553, 403 S.E.2d 456 (1991) (adjudication regarding creation, existence or

termination of vested right in land use can be made only by court of competent jurisdiction). As noted, § 15.1-491(a) further contemplates that proffers shall be voluntary. The voluntariness of a particular proffer is also a factual determination to be made on a case-by-case basis. See *Rinker v. City of Fairfax* (remanding case for factual determination), cited *supra* note 3.


[*11]

n7 For example, you indicate that the proffers tie performance of the conditions to stages of progress of the office development, a fact that suggests a relationship between the need for the improvements and the development. See 1989 Att'y Gen. Ann. Rep. 96, 98 (off-site water and sewer improvements expressly linked in proffer document to needs generated by proposed development satisfied requirement that improvements be "necessitated or required, at least in part, by the proposed development" for purposes of §§ 15.1-491.2 and 15.1-466 (A)(j), the latter being now recodified as § 15.1-466(A)(10)).

----- End Footnotes-----

Legal Topics:

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF MONTGOMERY

DIVERSIFIED INVESTORS XII, LLC,)
)
FAIRMOUNT PROPERTIES, LLC,)
)
and)
)
LLAMAS, LLC)
)
 Plaintiffs,)
)
v.)
)
THE TOWN COUNCIL OF THE TOWN OF)
BLACKSBURG, VIRGINIA,)
)
THE TOWN OF BLACKSBURG, VIRGINIA,)
)
and)
)
STEVEN M. HUNDLEY, in his capacity as Zoning)
Administrator of the Town of Blacksburg, Virginia)
)
 Defendants.)

Case No. CL07-1697

NOTICE OF HEARING

PLEASE TAKE NOTICE that on the 5th day of June, 2007, commencing at 2:15 p.m., or as soon thereafter as counsel may be heard, defendants, The Town Council of the Town of Blacksburg, the Town of Blacksburg, Virginia, and Steven M. Hundley, Zoning Administrator will move the Court for a ruling on their Special Plea and Demurrer previously filed herein at the Montgomery County Circuit Court, 1 East Main Street, Suite B-5, Christiansburg, Virginia, 24068.

You must be present if you wish to be heard.

TOWN COUNCIL OF THE TOWN OF BLACKSBURG,
THE TOWN OF BLACKSBURG, VIRGINIA, AND
STEVE M. HUNDLEY, ZONING ADMINISTRATOR

By:  _____
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CERTIFICATE OF SERVICE

I certify that on this 31st day of May, 2007, a true and correct copy of the
forgoing Special Plea and Demurrer was served by facsimile and first-class mail on:

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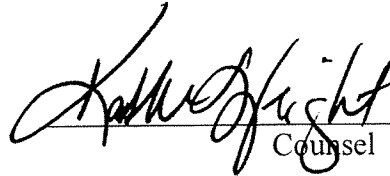
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