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**WALSH COLUCCI
LUBELEY EMRICH
& WALSH PC**

August 29, 2012

Via First Class Mail

Ms. Susan W. Blackburn, Zoning Administrator
Stafford County Department of Planning & Zoning
Zoning Division
P.O. Box 339
Stafford, Virginia 22555

**Re: Proffer Determination Request: Property of 3089-C Parcel, LLC
Stafford County Tax Map #21-64
Zoning District: B-2**

Dear Ms. Blackburn:

On behalf of **3089-C Parcel, LLC**, the Owner of approximately 2.801 acres located on the west side of Jefferson Davis Highway/Route 1 in the Rock Hill Magisterial District of Stafford County, Virginia, I write to request your review of the proffers associated with County Ordinance #O88-16(R).

By way of background, on February 2, 1988, the Stafford County Board of Supervisors rezoned Tax Map #21-64 ("Parcel 64"), then consisting of approximately 2.92 acres, from the R-1 zoning district to the B-2 zoning district, pursuant to County Ordinance #O88-16(R).¹ The Board's action was subject to two proffers:

- 1) Reservation of 40 feet of additional right-of-way for the future widening of Jefferson Davis Highway (Route 1); and
- 2) Consolidation of Parcel 64 with Stafford County Tax Map #21-65C, located immediately north of Parcel 64.

A copy of the survey that accompanied the Board's action is attached for your review and depicts Parcel 64 in its configuration at the time.² The survey clearly shows the location of Parcel 64 to

¹ A copy of County Ordinance #O88-16(R) is attached hereto and incorporated herein by reference as Exhibit 1.

² A copy of survey which accompanied County Ordinance #O88-16(R) is attached hereto and incorporated herein by reference as Exhibit 2.

the south and west of the "Lonnie Dalton" tract (the "Dalton Tract") and at the time Parcel 64 included approximately 129 feet of frontage along Route 1.

Parcel 64 was subsequently combined with Tax Map #21-65C, as well as Tax Map ##21-65, 21-65D, and 21-65E, as proffered, which resulted in a larger 5.13-acre parcel. Thereafter, Parcel 64 was resubdivided, with a 2.801-acre parcel north of the Dalton Tract continuing to be known as Parcel 64, while the remainder of the 5.13-acre parcel south of the Dalton Tract was incorporated into a larger 20-acre tract known as Tax Map #21-57B. This larger 20-acre tract includes 2.11 acres of the original 2.92-acre Parcel 64 that was subject to the 1988 rezoning. In its current configuration, the 2.801-acre Parcel 64 includes 234 feet of frontage along Route 1; however, none of the proffered reservation area of road frontage from the 1988 rezoning is included the current Parcel 64.³

In 2010 the owner submitted a by-right site plan (Stafford County Site Plan #1000324) for a "Suburban Suites Hotel" on Parcel 64. During the site plan review process, however, and in particular following several meetings with County staff, the County asserted that a 40-foot right-of-way *dedication* for Parcel 64's Route 1 frontage, consisting of approximately 0.2169 acres, was required to be shown on the site plan. In essence, Stafford County imposed an unjust exaction mandating dedication of this right-of-way to VDOT as a prerequisite to site plan approval.

County staff offered two justifications for this demand: (1) the proffers associated with County Ordinance O88-16(R) required such dedication; and (2) policies contained in the County's *Comprehensive Plan 2010-2030* (the "Comprehensive Plan") ostensibly required such dedication.⁴ County staff also noted that § 22-167 of the *Code of the County of Stafford, Virginia* requires that, where the Comprehensive Plan indicates that a proposed right-of-way greater than that shown along the boundaries of a lot, the additional right-of-way must be dedicated for public use.

These two justifications offered by Stafford County at the time of site plan review and since are legally insufficient. As to the County's first assertion, the portion of Parcel 64 shown on the 2011 site plan was simply not subject to the 1988 rezoning and, therefore, was not subject to the proffer requirement for a 40-foot right-of-way *reservation*. As to the County's second assertion, a locality may not, through its by-right site plan approval process, require applicants to dedicate right-of-way for a future road widening based on the recommendations of the

³ A vicinity map showing the current configuration of Parcel 64 is attached hereto and incorporated herein as Exhibit 3.

⁴ As to the latter assertion, Ms. Amy G. Taylor, an Engineering Specialist with the Transportation Division of the Stafford County Department of Public Works, further told the Owner's representative, Mr. S. Everett Lovell, that the County expected him not only to dedicate a 40-foot right-of-way along Parcel 64's Route 1 frontage, but also along approximately 950 other feet of Route 1 frontage, split between different properties managed by Mr. Lovell — even though those other properties were not the subject of Mr. Lovell's site plan.

Comprehensive Plan. This is particularly true where the need for such right-of-way is not roughly proportional to the demand created by the by-right development proposed. Such a requirement to the contrary is unconstitutional under both federal and state law.⁵

Virginia's Supreme Court has ruled that it is unconstitutional for a local government to attempt to condition site plan approval upon a site plan applicant making a dedication or constructing an improvement when the need for the dedication or improvement is not substantially generated by the proposed development. *James City County v. Rowe*, 216 Va. 128 (1975); *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580 (1984). The Court has also ruled that a local government may not condition site plan approval upon improvements to an existing public road even where it was shown that the need for such improvement is substantially generated by the proposed development. *Hylton v. Prince William County*, 220 Va. 435 (1979). Once a property is zoned, the locality has exhausted its legislative control over land use, and Virginia law considers that further, post-zoning, development plans are ministerial in character.⁶ *E.g., Ancient Art Tattoo Studio v. City of Va. Beach*, 263 Va. 593, 599 (2002).

It should be obvious, then, that Stafford County may only require a site plan applicant to build the roads, sewer and water lines, storm drainage facilities, storm management facilities and other improvements when the improvements are required by the proposed development. While the Comprehensive Plan may recommend that Route 1 be widened, that document is only a guide to development and cannot be used as a regulatory document or as a basis for land use exactions. County staff's claims, which elevate the Comprehensive Plan to the status of an ordinance by its wholesale incorporation into an administrative site plan review, and its contention that this creates an enforceable requirement for the dedication of private property to public ownership, is inconsistent with the role and legal status of such plans as established by the General Assembly and the Supreme Court, and cannot serve as a basis upon which to deny the Owner's otherwise ministerial valid site plan.

Regrettably, the Owner, faced with the unenviable financial decision as to whether to submit to the County's exaction demands and obtain site plan approval or to engage in a costly and lengthy litigation, reluctantly and involuntarily agreed to execute a Deed of Dedication on

⁵ A comprehensive plan requirement for property that a locality would like to have donated, but for which the constitutional standard is not met, cannot change this. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁶ If an action is legitimately "legislative" in nature, we understand that the locality may exercise substantial discretion with respect to an application. "Ministerial" plans, on the other hand, must be approved if they are consistent with minimum requirements of applicable ordinances, and cannot be denied for reasons outside of the locality's delegated legislative authority. *Board of Supervisors of Fairfax County v. Horne*, 216 Va. 113 (1975); *Board of Supervisors of Augusta County v. Countryside Investment Co.*, 258 Va. 497 (1999). There is perhaps one exception to this, where a locality is asked to vacate a subdivision plat, *Helmick v. Town of Warrenton*, 254 Va. 225, (1997), where the Supreme Court treated such vacation as a matter of legislative discretion.

June 30, 2011, recorded in the Land Records of Stafford County as Instrument #LR110012685.⁷ This Deed, executed by the Owner's representative, granted 40-feet of right-of-way, consisting of 0.2169 acres, along Parcel 64's Route 1 frontage.

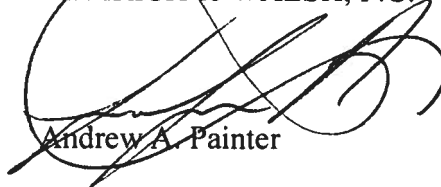
Given the foregoing, I would appreciate your review and written interpretation that:

- 1) The proffers accepted by the Board of Supervisors in conjunction with the approval of County Ordinance #O88-16(R) require the *reservation* and not the *dedication* of 40 feet of right-of-way for the future widening of Jefferson Davis Highway;
- 2) Any said reservation applies solely to the 2.11-acre portion of Tax Map #21-57B that was subject to County Ordinance #O88-16(R) and not the 2.801-acre parcel north of the Dalton Tract presently classified as Parcel 64 that is the subject of Stafford County Site Plan #1000324; and
- 3) Stafford County may not, through its by-right site plan approval process for Stafford County Site Plan #1000324, require 3089-C Parcel, LLC to dedicate right-of-way for the future widening of Jefferson Davis Highway based on the recommendations of the Comprehensive Plan.

I have enclosed a check in the amount of \$415.92 payable to the County of Stafford for the processing of this request. This fee includes the \$390.00 standard fee plus a notification fee for four adjacent property owners. Thank you for your kind attention to this matter. Please feel free to contact me at (703) 737-3633 if you desire any additional information or if you have any questions or comments.

Very truly yours,

WALSH, COLUCCI, LUBELEY,
EMRICH & WALSH, P.C.



Andrew A. Painter

Enclosures

⁷ A copy of the Deed is attached hereto and incorporated herein by reference as Exhibit 4.

Ms. Susan W. Blackburn, Zoning Administrator

August 29, 2012

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Cc: The Honorable Cord A. Sterling, Rock Hill District Supervisor
The Honorable Paul V. Milde, III, Aquia District Supervisor
Charles L. Shumate, Esq., Stafford County Attorney
Mr. Michael Smith, Stafford County Department of Public Works
Mr. S. Everett Lovell, Jr., 3089-C Parcel, LLC
J. Randall Minchew, Esq., Walsh Colucci

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