

# WILLIAMS MULLEN

Valerie W. Long, Esq.  
Direct Dial: 434.951.5709  
vlong@williamsmullen.com

August 18, 2023

VIA HAND DELIVERY AND EMAIL

Charlottesville City Council  
c/o Mr. Sam Sanders, City Manager and  
Ms. Kyna Thomas, Clerk of Council  
P.O. Box 911  
Charlottesville, VA 22902

**Re: CP23-00001: O E. High St. Substantial Accord Determination  
Petition for Appeal Pursuant to Va. Code Sec. 15.2-2232.B and City Code  
Sec. 34-28(a)(2)**

Dear Mr. Sanders, Ms. Thomas, Mayor Snook and Members of the Charlottesville City Council:

On behalf of Seven Development LLC (the "Applicant"), we hereby submit this petition of appeal of the determination by the City of Charlottesville Planning Commission at its meeting on August 8, 2023 that certain of the public facilities shown on the Applicant's proposed preliminary site plan<sup>1</sup> are not in substantial accord with the City's Comprehensive Plan pursuant to Section 34-28 of the City's Zoning Ordinance and Section 15.2-2232 of the Code of Virginia (the "2232 Determination"). This appeal is filed pursuant to Va. Code Sec. 15.2-2232(B) and City Code Sec. 34-28(a)(2) within 10 days after the 2232 Determination.

As a preliminary matter, the Applicant asserts that all Public Facilities were already deemed in substantial accord with the Comprehensive Plan by the time of the joint hearing of the Planning Commission and City Council on August 8, 2023 under the plain language of Va. Code Sec. 15.2-2232.B ("Failure of the commission to act within 60 days of a submission, unless the time is extended by the governing body, shall be deemed approval") and City Code Sec. 34-28(a)(1). The latest revision of the site plan application was submitted on June 2, 2023; we contend that it was deemed approved on August 1, 2023, prior to the 2232 hearing.

However, to preserve all rights, the Applicant files this Appeal, respectfully requesting that the City Council overrule the 2232 Determination as to the proposed Road A and Road B because the Applicant has presented clear evidence, both in the project application materials and at the Planning Commission hearing, that the project is substantially in accord with the Comprehensive Plan or part thereof. Please see attached a brief memorandum outlining the basis of our appeal. *We reserve the right to supplement the support for this appeal in further documentation and oral presentation to the City Council prior to or during its meeting to consider this appeal.*

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<sup>1</sup> (1) Public Road A, (2) Public Road B, (3) Caroline Avenue and Fairway Avenue widening, (4) Lot A with public trail, (5) Lot B with public parking and public trail (the "Public Facilities"). See Staff Report for Joint City Council and Planning Commission Public Hearing, August 8, 2023.

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Should you require anything further, please contact me at 434-951-5709 or VLong@williamsmullen.com. Thank you for your consideration of this request.

Very truly yours,

A handwritten signature in blue ink that reads "Valerie W. Long". The signature is fluid and cursive, with a long, sweeping tail on the "g".

Valerie W. Long

cc: Jacob Stroman, Esq. (via email)  
James Freas, Director of Neighborhood Development Services (via email)  
Seven Development, LLC (via email)  
Shimp Engineering, P.C. (via email)

**APPEAL OF THE CITY OF CHARLOTTESVILLE PLANNING COMMISSION'S  
SECTION 15.2-2232 DETERMINATION REGARDING  
PUBLIC FACILITIES ON THE PRELIMINARY SITE PLAN APPLICATION OF  
SEVEN DEVELOPMENT, LLC**

TO: The City Council of the City of Charlottesville

Pursuant to Va. Code § 15.2-2232, Seven Development LLC (the “Applicant”), hereby appeals the August 8, 2023 determination of the City of Charlottesville Planning Commission that the general or approximate location, character, and extent of the Applicant’s proposed Road A, Road B, and trailhead parking lot on Lot B, all of which provide access to public trails, as shown on the submitted Preliminary Site Plan are not substantially in accord with the City’s Comprehensive Plan, adopted November 15, 2021, or part thereof. The following public facilities are shown on the Preliminary Site Development Plan for 0 E. High Street, prepared by Shimp Engineering, P.C., originally submitted August 5, 2022, last revised and submitted June 2, 2023: (1) Public Road A, (2) Public Road B, (3) Caroline Avenue and Fairway Avenue widening, (4) Lot A with public trail, (5) Lot B with public parking and public trail (the “Public Facilities”). See Staff Report for Joint City Council and Planning Commission Public Hearing, August 8, 2023 (the “Staff Report”). These Public Facilities were considered by the Planning Commission at the August 8, 2023 joint hearing of the Planning Commission and City Council (the “Hearing”). The Planning Commission determined that Public Features (3)-(5) were in substantial accord with the Comprehensive Plan with the exception of the parking lot on Lot B but that Public Features (1) and (2) are not.

In support of this Appeal, the Applicant offers the following:

**I. The Public Features were Deemed Approved as of August 1, 2023.**

Va. Code Sec. 15.2-2232.B provides as follows: “Failure of the commission to act within 60 days of a submission, unless the time is extended by the governing body, shall be deemed approval.” City Code Sec.34-28(a)(1) provides as follows: “Failure of the planning commission to act within sixty (60) days of a submission (or in the case of a telecommunications facility: ninety (90) days), unless the time is extended by action of the city council, shall be deemed approval.” The latest revision of the site plan application was submitted on June 2, 2023, so on August 1, 2023, the public facilities shown on the site plan were deemed in substantial accord with the Comprehensive Plan by operation of the state statute and local ordinance. By the time of the August 8, 2023 joint hearing, there was no substantial accord determination for the Planning Commission to make.

Planning Commission was not aware of the legal status of the submission. During the Planning Commission’s deliberations at the Hearing, Commissioner D’Ononzio asked City Attorney Stroman to confirm his understanding that if the Planning Commission “deferred” and did not make a determination as to any of the five Public Facilities, then they would be deemed approved in 60 days. Mr. Stroman confirmed but went on to say, “the timeline is a bit more complicated than that because there’s a 60-day timeline from the date of submission, and that’s something I’m going to defer to staff on, but my point is this: the Planning Commission has, if the Planning Commission elects not to make a finding of compliance with the Comprehensive Plan

then, in the eyes of the law, it is deemed that the Planning Commission is approving the matters to move forward.”

The state statute is clear that the 60-day time period begins upon submission, not on the date the Planning Commission’s consideration or referral to the Planning Commission; this point is not a question for Staff interpretation. To understand the question of whether “submission” means submission by the applicant or submission by Staff to the Planning Commission, we refer to City Code Sec. 34-28(a)(1), which provides that “(f)ailure of the planning commission to act within sixty (60) days of a submission (or in the case of a telecommunications facility: ninety (90) days), unless the time is extended by action of the city council, shall be deemed approval.” Under state and federal law, the various time periods for mandatory action on applications for telecommunications facilities begin on the date of the applicant’s complete submission to the locality. This Code section does not distinguish between “submission” for telecommunications facilities and “submission” for other types of applications. Therefore, it follows that the date of submission by the applicant starts the 60-day period. The Planning Commission was allowed to misunderstand the status of the case and even the need for conducting the Hearing.

## **II. The Planning Commission was not Informed of its Authority under State and Local Law to Waive the 2232 Review as is Routinely Done in Private Development Cases.**

The Staff Report, prepared by Project Planner Carrie Rainey (“Staff” or “Ms. Rainey”), provided the following analysis regarding each of the Public Facilities: “Per Section 34-28(c), public facilities may be deemed a feature already shown on the adopted comprehensive plan, provided that the city council has by ordinance or resolution defined standards governing the construction, establishment or authorization of such public facility.” As to each Public Facility, Staff provided the applicable design guidelines or ordinance provisions.

As to Road A and Road B, Staff states: “City Council defined standards through the adoption of the Standards and Design Manual (SADM) on December 2, 2019.” The report goes on to say that the City Engineer found that both roads were consistent with the requirements of the SADM and that the City Traffic Engineer found that the roadways served a public good by incorporating access and parking for the city trail network.

As to the parking lot in Lot B, Staff explained in the Staff Report that “the floodplain ordinance applies to both privately and publicly owned land within the Special Flood Hazard Area (SFHA) developed by the Federal Emergency Management Agency (FEMA). Per Section 34-256(b), a floodplain permit is required prior to the approval of a final site plan .... the final design of the proposed parking lot and trail must comply with the floodplain ordinance and demonstrate no adverse effect in order to receive approval.”

Nevertheless, on the basis of advice the City Attorney delivered during the Planning Commission’s pre-meeting, and in response to an inquiry on the matter at the beginning of the Hearing, the Director of Neighborhood Development Services, James Freas, instructed the Planning Commission to “disregard” all references and analysis in the Staff Report regarding the Project’s consistency with the SADM and not to invoke City Code Section 34-28(c) because such Code Section was “permissive, not mandatory.”

The language of City Code Sec. 34-28(c) is substantially the same as Va. Code Sec. 15.2-2232.D, which provides as follows:

“Any public area, facility, park or use as set forth in subsection A which is identified within, but not the entire subject of, a submission under either § 15.2-2258 for subdivision or subdivision A 8 of § 15.2-2286 for development or both may be deemed a feature already shown on the adopted master plan, and, therefore, excepted from the requirement for submittal to and approval by the commission or the governing body, provided that the governing body has by ordinance or resolution defined standards governing the construction, establishment or authorization of such public area, facility, park or use or has approved it through acceptance of a proffer made pursuant to § 15.2-2303.”

The Planning Commission had the authority to exempt the Public Facilities from 2232 Review because standards for roads, paths, and parking lots are set out in various City regulations. Instructions from City Officials inadvertently misled the Planning Commission into the mistaken belief that they had no such authority, depriving them of their option to exercise their authority to deem the Public Facilities as substantially in compliance with the Comprehensive Plan. In fact, as discussed below, the City’s standard approach to public facilities that are part of private development is *not* to perform a 2232 Review. This 2232 Review and Hearing effectively undermined the ministerial nature of the by-right site plan review process.

The Applicant believes that at least part of the impetus for this instruction was a letter to the Planning Commission, dated August 6, 2023, from Henry H. Perritt, Jr., Esq., arguing on behalf of Rebecca Jones Reilly, that City Code Sec. 34-28(c) could not be used as the basis of a waiver (“public facilities may be deemed a feature already shown on the adopted comprehensive plan”) of the 2232 Review because the Application at issue is a site plan, not a subdivision, variance, or special exception. This statement reveals a misunderstanding of the applicable Virginia statute and City Code section. (The Applicant has not yet submitted a subdivision plat, so Va. Code Sec. 15.2-2258 is not at issue.) Section A(8) of Va. Code Sec. 15.2-2286 provides as follows: “A zoning ordinance may include, among other things, reasonable regulations and provisions as to any or all of the following matters.... (f)or the submission and approval of a plan of development prior to the issuance of building permits to assure compliance with regulations contained in such zoning ordinance.”

Mr. Perritt asserts that the term “plan of development” does not encompass preliminary site plans, concluding without explanation that “Subsection (A)(8) may not be interpreted to deem anything in an unapproved preliminary site plan to be shown already in a comprehensive plan, because such an interpretation would nullify the operation of Comprehensive-Plan review mandated by section 15.2-2232.” As stated above, Va. Code Sec. 15.2-2232 expressly provides an exception to performing the review if the public features are shown on a submittal for which there are already standards governing the construction, establishment or authorization. Mr. Perritt’s assertion, therefore, must be read to mean that a preliminary site plan is not a plan of development, which is an incorrect reading of the statute. In fact, the counterpart City Code section 34-28, enabled by Va. Code Sec. 2232, states as follows:

“(c) Any public facility that is identified within, but not the entire subject of, a submission for approval of a subdivision *or site plan*, may be deemed a feature

already shown on the adopted comprehensive plan, and therefore excepted from the requirement for submittal to and approval by the commission, provided that the city council has by ordinance or resolution defined standards governing the construction, establishment or authorization of such public facility or has approved it through acceptance of a proffer approved in connection with a rezoning application.”

Clearly, the City interpreted Va. Code Sec. 15.2-2232(D) as applying to site plans when it enacted this counterpart Code Section. Other than in the phrase “common plan of development,” which is a defined term, and references to PUD plans, the term “plan of development” is used in only five City Code Sections in the City’s Zoning Ordinance and is not a defined term but is a generic term that includes site plans. For example, Sec. 10-56(b) provides: “Acceptance or approval of an easement, subdivision plat, *site plan or other plan of development* shall not constitute acceptance by the city or the administrator of responsibility for the maintenance, repair or replacement of any such facility (emphasis added).” Similarly, Section 34-9 addressing vested rights states that significant affirmative governmental acts include an approved “final subdivision plat, *site plat or plan of development*.” Unquestionably, approval of a final site plan is a significant affirmative governmental act, but is not specifically referred to as such in the foregoing clause because it is encompassed in the term “plan of development.”

Va. Code Sec. 15.2-2232 provides that state code provisions prevail if there is any conflict between the State and City Code Sections. Looking to state statutes dealing with plans of development, we find that Va. Code § 15.2-2246 provides as follows: “Site plans or plans of development which are required to be submitted and approved in accordance with subdivision A 8 of § 15.2-2286 shall be subject to the provisions of §§ 15.2-2241 through 15.2-2245, mutatis mutandis.” In other words, site plans and plans of development are subject not only to local site plan regulations but also to all state statutes governing subdivision plats, as appropriately modified to be applicable to site plans. It follows, therefore, that it is more likely than not that 15.2-2232 would intend to treat site plans like subdivision plats and not exclude site plans.

If Mr. Perritt’s assertion that “Subsection (A)(8) may not be interpreted to deem anything in an unapproved preliminary site plan to be shown already in a comprehensive plan, because such an interpretation would nullify the operation of Comprehensive-Plan review mandated by section 15.2-2232” critiques the *timing* of review rather than the type of submission under review by noting that the preliminary site plan is “unapproved,” we note that it is standard practice for localities to review projects subject to special use permits for the more general comprehensive plan consistency prior to evaluating them according to ordinance-specified special use permit factors. By contrast, in the case of a site plan, review is ministerial, and the site plan must be approved if it complies with the site plan ordinance. It would have been difficult, if not illogical for the City to find the features of an approved site plan inconsistent with the Comprehensive Plan.

### III. **All Public Facilities are in Substantial Accord with the Comprehensive Plan or Part Thereof.**

A comprehensive plan is a guide to local governing officials making land use decisions. Board of Supervisors v. Lerner, 221 Va. 30 (1980). It is advisory only and does not have the status of a zoning ordinance. Board of Supervisors of Fairfax Co. v. Allman, 215 Va. 434 (1975). A

comprehensive plan may serve as a basis for the denial of a legislative action, such as a rezoning or special use permit. Lerner, 221 Va. at 37. However, the Project submission was for a ministerial approval. The 2232 Review, therefore, should not have considered factors for rezoning or special use permit approvals but only the goals and objectives of the Comprehensive Plan.

Staff set out in the Staff Report the following reasons why Public Roads A and B are consistent with Comprehensive Plan goals:

**“2021 Comprehensive Plan**

Chapter 4: Land Use, Urban Form, and Historic & Cultural Preservation

Future Land Use Planning Objective: Maximize access to public open spaces, urban agriculture amenities and schools.

Chapter 7: Environmental, Climate, and Food Equity

Strategy 3.1 Substrategy: Improve regional public access to the river.

**2022 Urban Rivanna River Corridor Plan**

Recreational Activities Recommendations

Recommendation 4 Increase the number and type of public access points to the river and waterfront for better public use and enjoyment of the water, with special consideration for accessibility for people with limited mobility.

Multipurpose Trails and Bridges Recommendations

Recommendation 9 Consider opportunities to expand community-wide access to the Rivanna River Corridor through a variety of modes.”

The Staff report sets out the following Comprehensive Plan support for the dedication of Lot B, including the parking lot:

**“2021 Comprehensive Plan**

Chapter 6: Transportation

Strategy 8.7 Seek opportunities for private donations of trail easements and construction of trail enhancements such as bridges or interpretive signage.

Chapter 7: Environment, Climate, and Food Equity

Strategy 3.1 Sub-strategy: Improve regional public access to the river.

Chapter 9: Community Facilities & Services

Strategy 15.2 Encourage land and easement acquisition along trail corridors to ensure permanent use as trail and the ability to manage land as park space, for multimodal enhancement, and as a green infrastructure resource.

Strategy 15.3 Ensure that all new trails and trail improvements are designed within the context of surrounding natural systems and urban areas to maximize positive and minimize negative impacts on environmental systems and cultural and historic resources.

**2022 Urban Rivanna River Corridor Plan**

Recreational Activities Recommendations

*Recommendation 4* Increase the number and type of public access points to the river and waterfront for better public use and enjoyment of the water, with special consideration for accessibility for people with limited mobility.

Multipurpose Trails and Bridges Recommendations

*Recommendation 9* Consider opportunities to expand community-wide access to the Rivanna River Corridor through a variety of modes.”

Roads A and B and their accompanying sidewalks, and the parking lot on Lot B are also in line with the following Comprehensive Plan goals, keeping in mind that the proposed roads and trailhead parking provide access to the public trails provided on the Project plan:

Chapter 6: Transportation

Strategy 1.3: Create safe walking and biking routes to every public school in the city, prioritizing schools with the highest percentages of free and reduced lunch participants.

Strategy 2.2: Through development processes, implement and incentivize improved facilities and amenities for non-motorized travelers, including those needed to support multimodal travel by residents, workers, and visitors.

Substrategy: incentivize sidewalk improvements and connectivity enhancements (e.g. alleys) and ensure that public pathways around, through, and to developments will not be impeded.

Strategy 3.1 Substrategy: Upgrade informal off-street paths to a standard that will allow residents of all ages and abilities to use them for walking and biking and connections to schools, parks, and other designations. This could include paths that follow sewer lines or other infrastructure installations, and could also include formalization of desire lines (informal paths created by people walking where there are no sidewalks or other infrastructure currently in place.”

Strategy 6.2 Substrategy: Coordinate to create transit, trail, and /or multi-use path links between Charlottesville’s existing pedestrian infrastructure and regional trails and destinations (including Monticello), as articulated in the 2019 Jefferson Area Bike and Pedestrian Plan.

Strategy 8.7: Seek opportunities for private donations of trail easements and construction of trail enhancements such as bridges or interpretive signage.

Chapter 7: Environment, Climate, and Food Equity

Strategy 3.1 Substrategy: Improve regional public access to the river.

Strategy 3.1 Substrategy: Continue public acquisition of natural areas along waterways to enable management strategies that protect water and habitat quality.

A comprehensive plan contains many goals and objectives, and no application will, or can be required to, further each and every individual goal and strategy. For instance, in the Planning Commission’s recent review of the Route 250 Bypass Fire Station noted below, the Planning



Commission determined that giving up green space was acceptable since the fire station would further the goal of improving fire safety infrastructure, even though preservation of green space is also a general goal of the Comprehensive Plan. Notably, Section 15.2-2232 does not require that public facilities be found to be in accord with every goal and strategy of the Comprehensive Plan, but merely that such facilities be *substantially* in accord with the adopted comprehensive plan *or part thereof* (*emphasis added*). Arguably, a public facility need only be found to be consistent with a single goal or provision of the comprehensive plan to satisfy the 2232 Review.

In this case, prior to final site plan approval the Project must meet all Flood Plain regulations and will not move forward if it impairs flood plains, floodways, or other protected natural resources. There is no prohibition against building roads in floodplains so long as they do not contribute to flooding and otherwise meet all application regulations. The Public Facilities clearly support the goals and furthers numerous strategies of the Comprehensive Plan to provide access to the Rivanna River and improve connectivity on roads and sidewalks.

#### **IV. The Application was Treated Differently from Similarly-Situated Applications.**

To the best of our knowledge, the City has never required dedications of public land, road widening, or other public facilities shown on a site plan for a private development project to be considered in a 2232 hearing. Rather, the City's practice has been to conduct 2232 reviews for City projects and road closures. Based on a preliminary review of the public records available online, we found four recent 2232 reviews:

November 2018: East High Streetscape

December 2019: Fontaine Avenue streetscape

February 2020: Barracks Road/Emmet Street intersection improvements

July 2021: Partial vacation of 13 Street NE (withdrawn by petitioner)

We note that that the Planning Commission did not conduct a specific 2232 review for the City's proposed Route 250 Bypass Fire Station. Rather, Comprehensive Plan compliance was analyzed as just one of the seven factors to be considered in the granting of a special use permit. Staff analysis pointed out that the subject property was designated for Open Spaces and Parks, but noted that the proposal met "some" of the 2021 Comprehensive Plan's goals regarding public infrastructure and City Fire/Emergency Medical Services. The analysis concluded that the proposed fire station would reduce public open space but would not interfere with nearby trails. The project was "deemed substantially compliance with the Comprehensive Plan."

During the Hearing on August 8, 2023, Justin Shimp of Shimp Engineering, representing the Applicant, stated that he had worked on over a thousand applications in the City, and none had been required to have a 2232 review for proposed public dedications and public facilities.

#### **CONCLUSION**

For the reasons set out in this Appeal, the Applicant respectfully requests that Council overrule the Planning Commission's determination that Road A, Road B, and the Lot B parking lot are not in substantial accord with the Comprehensive Plan, and uphold the Planning Commission's

determination that all other Public Facilities are in substantial accord with the Comprehensive Plan.

Respectfully submitted,

*Valerie W. Long*

Valerie W. Long  
Williams Mullen  
323 2<sup>nd</sup> Street, Suite 900  
Charlottesville, Virginia 22902  
434-951-5709  
[vlong@williamsmullen.com](mailto:vlong@williamsmullen.com)