

MEMORANDUM

**To: Mayor Snook, Vice Mayor Wade, and Councilors Payne, Pinkston and Puryear**

**Re: Petition for Appeal for 2232 Review for 0 East High St. Proposed Development**

**From: Jacob P. Stroman, City Attorney  
Ryan D. Franklin, Assistant City Attorney**



**Date: September 29, 2023**

**Introduction**

On August 8, 2023, the Charlottesville Planning Commission (“Commission”) by unanimous vote decided that the proposed public facilities of Public Road A, Public Road B, and the Parking Lot in Lot B were not substantially in accord with the Charlottesville Comprehensive Plan (“Plan”). Pursuant to Code of Virginia, § 15.2-2232(B), legal counsel for Seven Development LLC (the “Applicant”), filed a petition for appeal (the “Appeal”) of the Planning Commission’s decision. The Appeal raises four issues which the Applicant contends are a sufficient basis for the City Council (“Council”) to overrule the Commission’s decision. This memo briefly addresses the issues raised in the Appeal memorandum filed on August 18, 2023. It is the legal opinion of this office that the issues raised by the Applicant are not well-taken.

**I. The Public Features Were Not Deemed Approved on August 1, 2023**

Code of Virginia, § 15.2-2232(B) states that the 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.” (emphasis added). The Applicant argues that its application (“Application”) was submitted on June 2, 2023, and thus was deemed approved by the Commission on August 1, 2023. However, Code of Virginia, § 15.2-2232(D) imposes a “requirement for *submittal to* and approval by *the commission*.” (emphasis added). Thus, “submission” as used in Code of Virginia, § 15.2-2232(B) refers to submittal to the Commission, not City staff. The Application was submitted to the Commission on August 1, 2023, when the agenda item was delivered to the Commission for consideration at its August 8, 2023 meeting. Accordingly, the public improvements were not deemed approved when the Commission made its decision on August 8, 2023.

Moreover, the Applicant appeared before the Commission on August 8, 2023 and offered extensive comment. Doing so was inconsistent with its later assertion that the Planning Commission was deemed to have approved the public improvements. The Applicant failed to make any objection to the hearing on the basis that the public features were already deemed approved.

**II. The Commission was not denied its right to approve the Application using the Exception found in Code of Virginia, § 15.2-2232(D)**

The Planning Commission received a written comment a few hours before the public hearing asserting that while City Code § 34-28(C) permits the Commission to approve applications using an exception to the full 2232 Review procedure for submissions “for approval of a subdivision or *site plan*[.]” (emphasis added), Code of Virginia, § 15.2-2232(D) only allows this process for plans of development. Accordingly, the Planning Commission could not deem public facilities in a site plan as already shown the Comprehensive Plan. The Applicant was made aware of this comment and our office offered to recommend a continuance of the public hearing to allow time to review this issue. The Applicant, through its legal counsel, declined this opportunity. The Applicant argues that “site plan” and “plan of development” are the same legal term, and thus there is no potential conflict between the City’s ordinance and the state statute. However, “plan of development” is not defined in the Code of Virginia while “site plan” is defined. It would have been imprudent for the Commission to have proceeded with a permissive provision which allowed for the public improvements to be deemed approved given the apparent conflict between the City Code and the Code of Virginia rather than conduct the public hearing at which numerous individuals spoke and the Commission rendered a decision based on all of the information which was presented.

**III. The Public Facilities are not in Substantial Accord with the Comprehensive Plan**

The Applicant argues that Public Road A, Public Road B, and the Parking Lot in Lot B align with strategies in the Comprehensive Plan (“Plan”), and thus should have been approved by the Commission on August 8, 2023. However, as articulated in the Commission’s detailed findings, the proposed parking lot would increase the risk of flooding based on new construction of impervious surfaces in the floodplain, and the two dead-end roads would not increase street connectivity. Thus, the Commission had strong evidence to support its reasonable decision that three public facilities were not substantially in accord with the Comprehensive Plan.

**IV. This Application was not Treated Differently than Other Applications**

The Applicant argues the Commission was required to approve the Application using the exception to the 2232 Review, because other applications were approved this way. It is a fundamental principle of law that all real property is unique. Similarly, each development is unique, and each decision to conduct 2232 Review is dependent on the specific issues presented by the proposed public features. The Commission made a decision regarding whether the public features are in substantial accord with the Comprehensive Plan. It did not opt to use the exception. Doing so was entirely proper because use of the exception was strictly optional. The Supreme Court of Virginia in *Stafford Cnty. v. D.R. Horton, Inc.* confirmed that this exception “is optional, not mandatory”. 299 Va. 567, 576 (2021). The Commission elected to proceed with a review of the proposed public facilities which is specifically permitted by the Code of Virginia, and rendered a decision based on all of the evidence presented to it.

**V. Standing**

Code of Virginia, § 15.2-2232 provides that only a property owner or its agent may appeal a 2232 review. The Supreme Court of Virginia in *Miller v. Highland Cnty.* ruled that based on the “plain language of these statutory provisions, only the owner of the property at issue, or the *owner’s agent*, may appeal to the governing body from a “substantial accord” determination of the planning commission. . .” 274 Va. 355, 371 (2007) (emphasis added). Petitioner is not the owner of the properties. It has a purchase agreement with the property owners. At the public hearing on the 2232 Review, the Applicant did not assert that it was acting as the property owners’ agent. Nor did it make such an assertion when it filed its appeal. When the City made an inquiry about Applicant’s standing, the Applicant provided an undated letter from the property owners approximately one week ago. Despite a request to do so, the Applicant has not stated when it received the letter from the property owners allegedly designating the developer at the property owners’ agent. Thus, there is no basis on which to conclude that the developer was acting as the property owners’ agent during the 2232 Review process. Any agency designation should be clear and unambiguous. The Applicant has information relevant to this issue, but has chosen to withhold it.

**Conclusion**

Applicant’s appeal of the Planning Commission’s 2232 decision is not meritorious.