COUNTY OF ALBEMARLE

MEMORANDUM

TO: Mark Graham, Director, Department of Community Development
Amelia McCulley, Director of Zoning and Current Development
Bill Fritz, Chief of Current Development
Gerald Gatobu, Principal Planner
Amy Pflaum, Senior Engineer

FROM: Greg Kamptner, Deputy County Attorney

DATE: June 18, 2009

RE: *Arden Place; Zoning Ordinance § 32.7.2 and Related Issues*

Unfortunately, the staff report for Arden Place was distributed before I had a chance to respond to Bill's question from last Friday regarding staff's analysis of "safe and convenient access" under Zoning Ordinance § 32.7.2 and staff's related recommendation for denial of the Arden Place site plan. As you know, we had a preliminary discussion about this issue at a legal meeting a couple of weeks ago and the discussion centered on how Section 32.7.2 applied to Arden Place's anticipated traffic impacts at the intersection of Putt Putt Place and Rio Road East. Similarities between the traffic issues for this project and those that arose with the Faulconer, Gazebo Plaza and Rio Truck Repair site plans were noted, and the County's authority to deny a site plan based on off-site traffic conditions was briefly discussed.

From the staff report, we learn that staff is concerned not only with the traffic impacts arising from the lack of a signal on Rio Road East at its intersection with Putt Putt Place, but also Arden Place's anticipated traffic impacts at the Rio Road – Route 29 intersection. As noted in Bill's email to me last Friday and in the Arden Place staff report, VDOT, which has the primary authority over the safe design and construction of public streets, has not stated that these intersections are unsafe, and has stated that warrants are not met for signalization at the Putt Putt Place – Rio Road East intersection.

Based on the summary of the law below, our recommendation is that the staff report's analysis of Section 32.7.2 be revised and that a new staff report be circulated to the Planning Commission and the public before the end of the week.

1. <u>The County does not have the authority to deny a site plan based on off-site traffic impacts and conditions</u>

Zoning Ordinance § 32.7.2 cannot be interpreted in a way that allows a site plan to be denied because of the condition of or impacts to off-site public streets. The reason is simple – neither the State enabling authority for site plans (Virginia Code §§ 15.2-2241 and 15.2-2242, the same as those that apply for subdivision plats) nor the interpretation of those statutes by the Virginia courts (*Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435 (1979) among others) authorizes a locality to deny a site plan because of off-site traffic impacts or the need for off-site traffic improvements. Regardless of what any provision of the

Zoning Ordinance says, State law simply does not allow a site plan to be denied based upon off-site traffic impacts and conditions.

This issue is addressed at length in Chapter 25 of the Land Use Law Handbook, and the issue as it pertains to subdivision plats and site plans is addressed specifically in Sections 25-320 and 25-330. Following is a brief summary of some of the key points from Chapter 25:

The following passage is from Section 25-300 of the Land Use Law Handbook:

> There is no express or implied authority in the enabling legislation authorizing a locality to require off-site road improvements as a condition of subdivision plat or site plan approval. *See, Virginia Code § 15.2-2241, § 15.2-2242, and § 15.2-2243*. The case law . . . reflects a consistent theme that zoning decisions, not the subdivision or site plan process, are the place and time at which density and traffic considerations are to be addressed.

The following passage is from Section 25-320 of the Land Use Law Handbook:

> Virginia Code § 15.2-2243 authorizes localities to require a developer to pay the *pro rata* share of the cost of providing reasonable and necessary off-site sewerage, water and drainage facilities if the need for such facilities are required, at least in part, by the development. There is no similar provision for off-site road improvements. Virginia Code § 15.2-2242(4) is the only enabling authority that speaks to off-site road improvements. It authorizes the locality to provide "for the *voluntary* funding of off-site road improvements and reimbursements of advances by the governing body." The courts have consistently rejected any attempts by localities to expand the authority of localities to require off-site road improvements beyond what the General Assembly has expressly enabled.
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> In *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435 (1979), the Virginia Supreme Court considered whether the county could require a subdivider, as a condition of approval of a subdivision plat, to pay the cost of making certain improvements to widen two secondary roads abutting the property. . . . The Virginia Supreme Court held that there was no authority in the predecessors to Virginia Code § 15.2-2241 and § 15.2-2242, either express or necessarily implied, that enabled the county to require a subdivider to construct improvements to existing roads, or to pay a *pro rata* share of the cost of those improvements. . . *Hylton* remains controlling law in Virginia. A locality has no authority to require off-site improvements as a condition of site plan or subdivision plat approval, even if the need for the improvements is substantially generated by the project. *Compare with Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580 (1984) (authority to require off-site improvements as a condition of special use permit approval only if the need for the improvements is substantially generated by the project).
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> In *Smith v. Board of Supervisors of Culpeper County*, 22 Va. Cir. 82 (1990), the subdividers sought to create a 28-lot subdivision on a 58.6 acre tract of land. Although the subdivision plat complied with the requirements of the county's subdivision ordinance, the board of supervisors denied the plat because of a staff assessment that traffic on the main road of access to the subdivision "would be increased beyond its safe carrying capacity if 28 lots were approved and developed." . . . In holding that the county had no authority to require the subdividers to improve a public road without their agreement, the Culpeper County circuit court stated:
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> > The County seeks to control the volume of traffic on a public road until improved by withholding or conditioning subdivision approval. Control of the

> volume of traffic to the extent development of subdivisions increases the volume of traffic is properly achieved under Virginia law by the zoning ordinances which may limit the density to which land may be developed. The subdivision law of Virginia does not address this end.
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> . . .
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> In *Rackham v. Vanguard Limited Partnership*, 34 Va. Cir 478 (1994), the abutting owners of a 55-lot subdivision challenged the county's approval of a subdivision plat, claiming that it was approved contrary to law. The subdivision would be accessed via a secondary road, described as "a narrow, unimproved prescriptive easement approximately ten feet in width" that bisected the abutting owners' lands. . . . The commission . . . disapproved the plat on the ground that the off-site road was inadequate to handle the increase in traffic generated by the subdivision. . . . The court then discussed the other basis upon which the commission had disapproved the subdivision plat – the inadequacy of the off-site road to handle the increase in traffic generated by the subdivision. The court quickly dispensed with this issue, stating that the need for future off-site road improvements was not a relevant consideration to preliminary subdivision plat approval.
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> The following passage is from Section 25-330 of the Land Use Law Handbook:
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> Although the subdivision cases discussed in section 25-320 apply to site plans as well, at least one case has considered the authority of a locality to require a developer to make or contribute to off-site road improvements as a condition of site plan approval.
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> In *Potomac Green Associates Partnership v. City Council of City of Alexandria*, 761 F. Supp. 416 (E.D. Va. 1991), *reversed on other grounds*, 6 F.3d 173 (4th Cir. 1993), the city required, as a condition of site plan approval, that the applicant construct two additional lanes on the George Washington Memorial Parkway which was adjacent to the applicant's property. The district court first reviewed the enabling authority for off-site improvements, which is now found in Virginia Code § 15.2-2243 and which is limited to sewerage, water and drainage facilities, and concluded that there "is no express authorization for a developer of land to make off-site improvements at his expense to the surrounding highways." Then, citing *Board of Supervisors of James City County v. Rowe*, 216 Va. 128 (1975), *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580 (1984) and *Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County*, 220 Va. 435 (1979), the court concluded that there was no implied authority to require private landowners to build additional lanes on public roads as a condition of site plan approval.

Under State law, there is no authority for the County to deny a site plan because of off-site traffic impacts or conditions.

2. <u>The scope of Section 32.7.2 is more limited than staff's interpretation of that section</u>

We have explored the meaning of Section 32.7.2 many times under various factual situations. Our impression is that staff focuses on the phrase "safe and convenient access" found in the section heading, and that phrase appears to have become a standard unto itself with virtually unlimited scope and application.

A. <u>The phrase "safe and convenient access" pertains to ingress to and egress from a site, not the impacts to or conditions of off-site streets</u>

The phrase "safe and convenient access" does not appear in the body of Section 32.7.2 itself and the actual language in the regulation reveals that its scope is rather limited. The relevant operative term, in both the section heading and in the body of the regulation, is the word "access." The most relevant definition of "access" in Webster's Third New International Dictionary is "a landowner's legal right to pass from his land to a highway

and to return without being obstructed." In other words, safe and convenient access actually pertains to the ingress to and egress from a site, and nothing more, and in the first paragraph of Section 32.7.2, that is precisely the language used in the first sentence of that paragraph – "safe and convenient ingress from and egress to one (1) or more public roads."

Consistent with Section 32.7.2's limited scope, we concluded in *Gazebo Plaza* that the phrase "safe and convenient access" actually means little more than having an entrance (in VDOT terms, the commercial entrance) to a site that meets VDOT's design and construction requirements.

B. <u>The authority granted to the commission and the agent under Section 32.7.2 is limited to issues pertaining to "access points"</u>

The second sentence in the first paragraph of Section 32.7.2 is the sole express grant of authority to the planning commission and the agent regarding safe and convenient access, and it reflects the limited scope of Section 32.7.2:

> To these ends, the commission or the agent in the review of a site plan may specify the number, type, location and design of access points to a public street together with such measures as may be deemed appropriate to insure adequate functioning of such access points.

As the only specific grant of authority in the first paragraph of Section 32.7.2, this sentence merely grants authority to specify the number, type, location and design of "access points" – not streets or off-site intersections. Interpreting this language in a manner consistent with the State enabling authority found in Virginia Code § 15.2-2241(2) and (4), this sentence means that the County may regulate the location and extent of on-site streets and the points at which they may interconnect with existing or proposed off-site streets. This authority was at issue in the *Belvedere Station Land Trust* case, where the County required an on-site street to be extended to the property line to provide an access point when the adjoining parcel developed.

Nothing in the second sentence of the first paragraph of Section 32.7.2 allows the County to deny a site plan based on the impacts to or the conditions of off-site streets, particularly where there are no concerns or requirements imposed by VDOT. There also is no authority in that provision to deny a site plan because a developer is unable to secure the cooperation of an abutting landowner to allow the access street to connect. It is sufficient for the developer to extend the on-site street to the property line, *i.e.*, to establish an access point.

C. <u>Private streets may be considered on-site only in very limited circumstances</u>

We note that Section 32.7.2 creates some confusion because of its reference to safe and convenient access to a "public road" and, in many cases, the proposed development takes its immediate access from a private street, as is the case with Arden Place.

A literal application of Section 32.7.2 can place a developer in a quandary if the point at which the private street meets the public street is off-site and not under the control of the developer. In some cases it may be appropriate to consider the private street as "on-site" up to the point at which the private street intersects with the public street, such as when VDOT requires an entrance permit or when the existing private street was designed, constructed and approved to a lesser standard and an upgrade is required to be at an appropriate design standard (such as when a private road serving a 3-5 lot subdivision needs to be upgraded when 6 or more dwellings will be served by it).

Neither of those situations apply to Arden Place where VDOT has not identified any need for an entrance permit and the staff report expresses no stated concern about the design of Putt Putt Place or the ability of that street to handle traffic from Arden Place. The Background section on page 6 of the staff report refers to "exacerbated traffic on existing streets [Putt Putt Place and Rio Hill Drive], but there are no facts or discussion about those impacts. The only impacts discussed are those at the intersections of Putt Putt Place and Rio Road

East and Rio Road East and Route 29. Thus, in this case, for all intents and purposes the intersection of Putt Putt Place and Rio Road East should be considered to be off-site in this case.

D. Section 32.7.2's subsections are consistent with the limited scope of that section's first paragraph

Section 32.7.2's subsections are consistent with the interpretation of Section 32.7.2's first paragraph discussed above.

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Sections 32.7.2.1 and 32.7.2.2 pertain to "entrances." Section 32.7.2.3 pertains to providing access that is not subject to flooding. Section 32.7.2.4 provides that more than one street "connection" be provided for developments having 50 or more dwelling units. Section 32.7.2.5 authorizes the commission and the agent to provide travel lanes or driveways to serve adjoining properties. Section 32.7.2.6 authorizes land to be dedicated in lieu of providing travel lanes or driveways to serve adjoining properties in particular situations. Section 32.7.2.7 provides for the design and construction of on-site parking and circulation. Section 32.7.2.8 provides for sidewalks and pedestrian walkways, including their connection to existing sidewalks and walkways on adjoining developments.

None of these subsections pertain to off-site improvements.

3. The staff report acknowledges that the intersections at issue are already failing

The staff report states that the two intersections on which staff is basing its recommendation for denial of the site plan are "already failing." Even if this project was a rezoning or a special use permit, the County could require that these off-site impacts be addressed only if the need for the improvements was "substantially generated" by this project. See, *Cupp v. Board of Supervisors of Fairfax County*, 227 Va. 580 (1984).

Whether the need for off-site improvements is substantially generated by a development is irrelevant to the question of whether a site plan should be approved or denied because there is no authority to require off-site street improvements. At the site plan stage, it is simply too late in the game to require off-site street improvements. What the courts would say is that the Arden Place property is zoned R-15 and that the County and VDOT have known for years that the property would be developed with hundreds of dwelling units, and it was the responsibility of the County and VDOT to plan for those traffic impacts across all of the years the property sat undeveloped. That failure is a burden that everyone must share, not the developer of Arden Place.

4. The safety concern raised in the staff report is not based on any identified objective criteria

The staff report states that the delays at the Putt Putt Place – Rio Road East intersection are unsafe because they would "encourage drivers to attempt to enter traffic without sufficient space" and that this could lead to unsafe situations. This concern, even if relevant at the site plan stage, is not tied to any objective criteria established in the Zoning Ordinance.

This kind of approach has been rejected by the courts. The analysis of the court in *Mountain Venture Partnership v. Town of Lovettsville Planning Commission*, 26 Va. Cir. 50 (1991), discussed at length in Sections 25-310 and 25-320 of the Land Use Law Handbook, illustrates the troubles the courts would have with this kind of approach. In *Mountain Venture*, the planning commission denied a preliminary subdivision plat for a 194-unit townhouse development on three grounds, one of which was because the subdivision's two access points did not provide safe and convenient access onto the adjoining public road. Absent objective regulatory standards to determine what is required for an access to be safe, and absent any concerns by VDOT, the court found that the planning commission's denial of the plat on this ground was arbitrary and capricious, stating:

> The Virginia Department of Transportation (VDOT), one of the referring agencies, raised no concern about the safety of the street arrangement for the townhouse section of Avonlea. There is no Town ordinance concerning the number of vehicular trips which a subdivision may be

> allowed to generate. There is no ordinance regulating the number of townhouse units per entrance to a public street. There is no ordinance relating design criteria for streets to the number of vehicles passing over a street. VDOT raised no objection to the entrances from the townhouse area of Avonlea onto the public street . . .

The court then elaborated on its concerns about the absence of objective standards to control the decision as to whether the access points were safe:

> With no ordinance to guide the Planning Commission, if this reason were valid, then an applicant with a subdivision such as Avonlea would be at the mercy of the Planning Commission. Its whim could determine whether a preliminary plat is approved or denied. While one of the purposes of a subdivision ordinance is to promote the safety of the public . . ., such purpose does not give a planning commission the authority to deny a preliminary plat which conforms to the requirements of the applicable ordinance for the sole reason that in its opinion alone, the subdivision would create a public safety problem.

As noted above, neither VDOT nor any other reviewing agency had raised safety concerns with the Town of Lovettsville about the access points. Under the reasoning of *Mountain Venture*, concerns about safe and convenient access need to be established by the application of objective standards pertaining to traffic volume and design or be supported in a writing from VDOT expressing concerns about traffic volume and/or design. In holding that the commission's disapproval of the subdivision plat was improper, the *Mountain Venture* court noted that when the land at issue was rezoned to its current density, the rezoning "clearly put the Town and all its officials on notice that Mountain Venture could seek approval for as many as 194 townhouse units."

The facts in Arden Place are at least one step further removed from those in *Mountain Venture* because that case involved on-site/access point issues, not off-site traffic impacts and conditions as is the case with Arden Place.

5. <u>Arden Place abuts a public street and has a right to access it</u>

Arden Place would be developed on Tax Map and Parcel Number 61-124, a parcel that abuts Rio Road East. We assume that Arden Place is taking its access through Putt Putt Place because of VDOT's desire to control the number of entrances off of Rio Road East. Parcels abutting public streets have certain rights to access those public streets which appear to have been overlooked in this case.

The following passage is from Section 24-300 of the Land Use Law Handbook:

> Members of the public share a common right to use a public road, and this right cannot be restricted by arbitrary action of the local governing body. *See, Thompson v. Smith*, 155 Va. 367 (1930), *cited in 1985-86 Va. Op. Atty. Gen. 81*.
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> Property owners generally have a private right to use a road that abuts their property when the use of the abutting road is necessary to the enjoyment and value of the property. *City of Staunton v. Cash*, 220 Va. 742 (1980), *cited in 1985-86 Va. Op. Atty. Gen. 81*. In other words, abutting landowners have an easement of access to a public street. *State Highway and Transportation Commissioner v. Linsly*, 223 Va. 437 (1982). The exercise of that right, however, is subject to the right of the locality to control the streets to promote the public safety and welfare. *Linsly, supra*; *State Highway and Transportation Commissioner v. Easley*, 215 Va. 197 (1974); *Wood v. Richmond*, 148 Va. 400 (1927) (pre-Byrd Road Act, holding that the city could require the removal of one of two driveways). A restraint upon the use of private property to promote the public welfare is a proper exercise of the police power and is not a taking requiring just compensation. *Linsly, supra*. For example, *entrances* and *curb cuts* may be reasonably regulated in the exercise of the police power. *Board of Supervisors of Fairfax*

County v. Southland Corp., 224 Va. 514 (1982). However, access may not be entirely denied, absent a *taking* for public use and the resulting constitutional necessity for the payment of just compensation. *Southland Corp. supra*.

This common law right can be restricted only pursuant to specific statutory authority or by the exercise of the county's police power. *See, Azalea Corp. v. City of Richmond*, 201 Va. 636 (1960), *cited in 1985-86 Va. Op. Atty. Gen. 81*. Virginia Code § 15.2-2267 is such statutory authority, enabling a board of supervisors to restrict ingress and egress on publicly used roads not in the secondary system that are used primarily for the inhabitants of a subdivision. The statutory prerequisites must be strictly complied with. *1985-86 Va. Op. Atty. Gen. 81*.

We have found no statutory authority similar to Virginia Code § 15.2-2267 that might provide authority to deny a site plan for the reasons stated in the staff report. As far as basing such a decision on the County's general police powers, that authority is trumped by the well-established State enabling authority and case law on this issue discussed in this memorandum. As discussed above, several cases have rejected a locality's safety concerns as grounds to expand a locality's authority over subdivision plats and site plans.

Section 24-310 of the Land Use Law Handbook discusses the applicable law when all direct access to the abutting public street is denied:

The complete extinguishment of direct access to an abutting public street is compensable where there is no other direct access. *State Highway and Transportation Commissioner v. Dennison*, 231 Va. 239 (1986) (installation of unbroken curbing extinguished direct access to residue and was compensable); *State Highway and Transportation Commissioner v. Linsly*, 223 Va. 437 (1982) (extinguishment of direct access and provision of indirect access via a service road was compensable); *Commonwealth Transportation Commissioner of Virginia v. Miners Exchange Bank*, 33 Va. Cir. 261 (1994) (elimination of two direct access points and replacing them with a dead-end service road providing indirect access was compensable); *Smith v. State Highway and Transportation Commissioner*, 4 Va. Cir. 223 (1984) (25-foot wide entrance located directly beside restaurant, too close to the highway right-of-way to allow traffic to reasonably enter or exit, was not reasonable; direct access was therefore extinguished and was compensable).

Section 24-330 of the Land Use Law Handbook discusses the applicable law when direct access is reduced or limited:

The reduction or limitation of direct access to an abutting property generally is not compensable. *State Highway and Transportation Commissioner v. Lanier Farm, Inc.*, 233 Va. 506 (1987) (claim that a proposed entrance would have to be relocated to a less advantageous location was not compensable where direct access would be provided); *State Highway and Transportation Commissioner v. Easley*, 215 Va. 197 (1974) (curbing installed with two openings to allow direct access to the property was not compensable because there was no evidence that the openings in the curbing would not provide the abutting owner with reasonable access); *State Highway and Transportation Commissioner v. Howard*, 213 Va. 731 (1973) (median strip installed with no opening at the property's entrance resulted in an incidental non-compensable inconvenience); *Wood v. City of Richmond*, 148 Va. 400 (1927) (reduction of direct access points from two to one for purposes of traffic control and public safety was not compensable); *State Highway Commissioner v. 1619 Associates*, 6 Va. Cir. 108 (1984) (in ruling on a motion *in limine*, the court said that the closing of a crossover opposite the driveway of the property was not compensable).

The guiding rule in this line of cases reinforces the right of the locality and the State to control access to public streets and, where appropriate, to reduce or limit direct access. The

Virginia Supreme Court has said that frustration of a landowner's plans for development or future use is not in itself compensable. *Lanier Farm, Inc., supra*.

Thus, as long as some direct access is provided, a compensable taking has not occurred. In this case, that issue would have been avoided by Arden Place having its access by way of Putt Putt Place or the existing public right-of-way abutting the development in Woodbrook. If the site plan is denied, however, Arden Place could be found to have been denied all access to Rio Road East.

6. <u>The findings of a traffic analysis pertaining to off-site street impacts and conditions do not provide a basis to deny a site plan</u>

A traffic analysis may be triggered at the subdivision plat or site plan stage under Virginia Code § 15.2-2222.1(C), and VDOT is provided the opportunity to review and comment on the subdivision plat or site plan.

Under State regulations promulgated after Virginia Code § 15.2-2222.1 was adopted, VDOT may "request a meeting with the locality to discuss potential modifications to the proposal to address any concerns or deficiencies." *24 VAC 30-155-50(D).* VDOT is also directed to "conduct its review and provide official comments to the locality for inclusion in the official public record. VDOT shall also make such comments available to the public." *24 VAC 30-155-50(D).* 24 VAC 30-155-70 states in part: "After concluding its review of a proposed comprehensive plan or transportation plan or plan amendment, rezoning, or site or subdivision plan, VDOT shall provide the locality and applicant, if applicable, with a written report detailing its analysis and when appropriate recommending transportation improvements to mitigate any potential adverse impacts on state-controlled highways." At most, this statutory and regulatory scheme allows VDOT to make recommendations pertaining to addressing impacts. It does not authorize a locality to deny a subdivision plat or site plan based on off-site traffic issues and, perhaps most telling, the primary enabling authority for requirements for subdivisions and site plans found in Virginia Code §§ 15.2-2241 and 15.2-2242 have not been amended in a relevant way since Virginia Code § 15.2-2222.1 was adopted.

Thus, the County still lacks the authority to require off-site street improvements in conjunction with a site plan, or to deny a site plan because of those off-site street conditions.

7. <u>Conclusion</u>

Our recommendation is that the staff report's analysis of Section 32.7.2 be revised and that a new staff report be circulated before the end of the week.