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February 27, 2015

**VIA HAND DELIVERY**

Susan W. Blackburn  
Zoning Administrator  
County of Stafford  
Post Office Box 339  
Stafford, Virginia 22555-0339

Re: Request for Vesting Determination – Austin Park, Assessor’s Parcel 30-7H

Dear Ms. Blackburn:

Enclosed please find an application for a vesting determination for the Austin Park development, located on Assessor’s Parcel 30-7H, consisting of 28.8836 acres, more or less, owned by Austin Park Development, LLC, a Virginia limited liability company. Please consider this letter as supplemental information for the vesting determination application.

**Statutory Vesting Test**

As you are aware, the test or determining vesting for zoning is codified at Virginia Code Section 15.2-2307. A landowner must satisfy the three part test and is deemed vested if he

- (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project;
- (ii) relies in good faith on the significant affirmative governmental act; and
- (iii) incurs extensive obligations or substantial expenses in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.

Pursuant to Virginia Code Section 15.2-2286A4 the Zoning Administrator is authorized to “. . . make findings of fact, and with the concurrence of the attorney for the governing body, conclusions of law regarding the determinations rights accruing under §15.2-2307 . . . .”

The following sections address each prong of the statutory vesting test and what I believe is relevant information for your vesting determination.

### **Significant Affirmative Governmental Act(s)**

Austin Park is somewhat unique in that the current zoning (B-2) was obtained with proffers in 2004 (Ordinance 004-41 attached hereto), which was followed shortly by a 2005 proffer amendment (Ordinance 005-62 attached hereto), which amplified certain aspects of the development, particularly pertaining to design standards and cash contributions for the commercial apartment portion of the development. Under §15.2-2307 the 2004 rezoning constitutes a Significant Affirmative Governmental Act ("SAGA") pursuant to "(i) the governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment" or "(ii) the governing body has approved an application for a rezoning for a specific use or density." Under the 2004 rezoning it is apparent that the development will occur under the B-2 Urban Commercial zoning district and will be subject to certain proffers governing architectural treatment, signage and access. The 2005 proffer amendment, which is also treated as an amendment to the Zoning Ordinance by the County, adds additional specifications to the project through amended proffers covering, in particular, design and architectural treatment and cash contributions for commercial apartments, then permitted under the B-2 Ordinance.

In my view the proper treatment of these events under the statutory test is to consider the 2004 rezoning as the SAGA. The 2004 rezoning permitted the development of a specific project, namely a commercial development, as permitted under the B-2 Zoning District. It also specified use through the proffers adopted with the rezoning. Conceivably the 2005 proffer amendment could also qualify as a SAGA, since "the governing body accepted proffers or proffered conditions which specify use related to a zoning amendment," as the County treats a proffer amendment as an amendment to the Zoning Ordinance.

If the 2004 rezoning is treated as the SAGA, the 2005 proffer amendment would be treated as subsequent action in reliance on the SAGA (pursuant to the second prong of the statutory test), and the expenditures and obligations there under would count toward the third prong of the statutory test, along with additional development plans and obligations incurred after 2005. On the other hand, if the 2005 proffer amendment is treated as the SAGA, the expenses and obligation necessary to satisfy the third prong of the statutory test would be those incurred after the proffer amendment was adopted.

### **Good Faith Reliance**

The second prong of the statutory test has prompted the judicial discussion since it goes without saying that if the landowner takes any extensive or substantial subsequent action to further the project approved by the SAGA the second prong is met. Thus, the analysis shifts to the third prong of the test, and if that prong is satisfied prong two is also satisfied.

### **Extensive Obligations and Substantial Expenses**

The third prong of the statutory vesting test may be satisfied by either “extensive obligations or substantial expenses” incurred “in diligent pursuit of the specific project in reliance on the significant affirmative governmental act.” I have attached summaries listing the expenses incurred toward the implementation of the project. The summaries contain all expenses incurred by Austin Park Development, Inc., since the 2004 rezoning and the total cost of \$402,499.09 includes all such costs, except for the additional \$17,385.75 incurred in conjunction with the negotiation for sale of the property or portions of it. Should you for any reason determine that the 2005 proffer amendment constitutes the SAGA, then only the expenses incurred from 2006 on would count toward prong three of the statutory test, although this is still a substantial number. Some of the expenses covered multiple years and may have commenced prior to the 2005 proffer amendment. I note, however, that many of these expenses were generic and occurred in conjunction with the 2004 rezoning, but were carried over and extended after the 2005 proffer amendment. Some of the more significant expenses were for site plan preparation, which was submitted and approved by the County, but not bonded due to the uncertainty of the market in 2007. Other costly items included the engineering and design work for the entrance improvements and utilities. The expenses for all of the items were incurred after both the 2004 rezoning and, generally, after the 2005 proffer amendment as well. Backup documentation for most of these items is available and can be forwarded to you if necessary for your review.

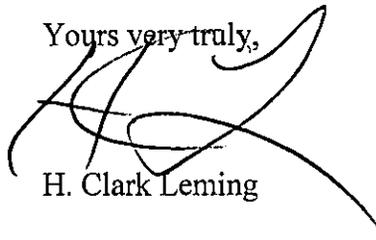
The only legal guidance of the sufficiency of obligations and expenses occurs in the cases that follow. In **Stafford County Board of Supervisors v. Board of Zoning Appeals**, Case No. 2005-505, the Stafford County Circuit Court issued an opinion in a vested rights case that held “[t]hat the landowners incurred substantial expenses, approximately \$20,000, in diligently pursuing the project from 1989 through 1995.” In **City of Suffolk v. Board of Zoning Appeals for the City of Suffolk**, 580 SE2d 796 2003, the Supreme Court of Virginia concluded that a landowner’s expenditure of “. . . over \$158,000 between 1993 and 1998 toward the development of the Property” constituted substantial expenses. As recently as September 12, 2011, in **In Re: September 28, 2010 Decision of the Board of Zoning Appeals of Stafford County, Virginia – Appeal A10-1/1000030** (Case No.: CL100001425-00), the Stafford County Circuit Court found that the landowner’s expenditures associated with erosion and sediment control design for an existing road and turnaround as well as engineering for the subject lot constituted substantial expenses in diligent pursuit of a specific project. In that case, the landowner paid a \$500 grading permit fee to the County, incurred a cost of \$17,312.50 for site engineering and erosion and sediment control, and posted a bond of \$34,648. More recently, in the matter of **John B. McQueen v. Board of Supervisors of Prince George County** (Case No. CL10-432) the Prince George County Circuit Court found that the sum of “. . . \$35,000 is a significant investment to force a citizen to forfeit in case law changes, and it meets the standard of §15.2-2307.”

None of the foregoing cases addresses the subject of extensive obligations. However, the expenses incurred by the landowner here far exceed the totals in any of the foregoing cases and I believe are more than sufficient to satisfy the third prong of the vesting test and, by implication, the second prong.

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Based on the foregoing, I request that you find the Austin Park development, as it was configured based on the 2004 rezoning, and 2005 clarification of the project, to have met the requirements of the statutory vesting test at Virginia Code §15.2-2307. Please let me know if I can provide further information or clarification.

Yours very truly,

A handwritten signature in black ink, appearing to be 'H. Clark Leming', written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

H. Clark Leming

Enclosures

cc: Richard Gillis  
Irv Ross