

September 15, 2016

**TO: Members of the Fauquier County Board of Supervisors
Community Development Staff**

RE: Unlawful Payandeh Subdivisions, WAIV-16-005690

This letter provides information and reasons why the Board of Supervisors should not approve the "Land Development Application for a waiver of the Zoning Ordinance requirement that a private street connect directly to a state maintained road" filed by ZAND 78 LLC and DEMAVAND 9 LLC (the "LLCs") on August 18, 2016 (the "Waiver Request").

This letter is filed on behalf of property owners in the Apple Manor Subdivision and concerned citizens of Fauquier County who have signed a petition (the "Petition") urging the County to deny any infrastructure plans, waivers, or boundary line adjustments that may be filed by the LLCs with respect to eight lots that resulted from the unlawful resubdivision in 2007 of three lots in the Apple Manor Subdivision by Mehrmah Payandeh (the "Payandeh lots" or the "unlawful subdivisions") and to commence proceedings to vacate the three unlawful subdivisions from the County's land records. The Petition provides important additional information and discusses in greater detail the reasons why we believe the Waiver Request should be denied and the unlawful subdivisions vacated.

The legal status of the unlawful subdivisions

The Waiver Request has been filed by the LLCs in an attempt to comply with the Apple Manor restrictive covenants that were in effect in 2007 which prohibited any resubdivision of the Payandeh property except in compliance with the 1997 Fauquier County subdivision ordinance. The Virginia Supreme Court on July 31, 2015 ruled that the Payandeh resubdivisions violated the Apple Manor covenants and the 1997 subdivision ordinance by using Type III streets instead of Type I or II streets. The Supreme Court ruled that "Type III roads do not fulfill the requirements of the FCSO." The Apple Manor covenants no longer permit any subdivision of the Payandeh property.

The LLCs are under an injunction issued by Judge Parker on February 1, 2016 expressly prohibiting them from treating the Payandeh lots as a lawful subdivision. On August 1, 2016 Judge Parker issued the following Decree under which the LLCs will be required to vacate the lots resulting from the unlawful subdivisions if certain conditions are not met:

The injunction imposed by the Court's February 1, 2016 Order remains in effect, and the lots resulting from the unlawful re-subdivision, to wit: Lots 7R-1A, 7R-1B, 7R-1C, 8A, 8B, 8C, 9R-1A and 9R-1B, **shall be promptly vacated** by Defendants, unless Defendants by December 9, 2016 or such date as the court sets, present County-approved, recordable plats and plans necessary to construct the Type I or Type II street as proposed in the June 9, 2016 plats and plans and otherwise comply with the ordinance requirements as incorporated into the covenants for streets in a proposed subdivision as required by the Supreme Court's Order dated July 31, 2015....

The decree enumerates, without limitation, the following requirements:

- i. The Type I or II private streets must connect directly to a state-maintained street and meet the Type I or II requirements.
- ii. The private streets shall be limited to those streets which are not required or designed to provide access to adjacent properties or the remainder of the tract being developed, or other streets.
- iii. No private street shall traverse a lot except along the boundaries of such lot or except where the portions of the lot on either side of the new street satisfy the minimum requirements of the ordinance for the creation of lots.
- iv. The currently vacated portion of Apple Manor Road shall be properly rededicated as part of Apple Manor Road and meet the appropriate street requirements.
- v. Orchard Hill Lane and the portions of Audubon Trail that border lots 9R-1A and 9R-1B must comply with the Fauquier County subdivision ordinance as incorporated into the Covenants.

The applicant's Waiver Request incorrectly states that "[t]he proposed road design is a design that can comply with the Supreme Court's order." The proposed road clearly does not comply with the Supreme Court's order or the requirements of Judge Parker's August 18, 2016 decree.

Among other things, the street plan in the Waiver Request differs significantly from that in the June 9, 2016 plan, which is the governing plan under the decree. It also does not show compliance with the Type I or II requirements on Orchard Hill Lane and Audubon Trail bordering lots 9R-1A and 9R-1B, as required. Moreover, the ordinance requirements that must be met are "the ordinance requirements as incorporated into the covenants for streets in a proposed subdivision." The LLCs have not proposed a

subdivision but rather have submitted infrastructure plans for an existing, unlawful subdivision.¹

New Apple Manor covenants prohibit any resubdivision of the lots

New Apple Manor covenants were adopted in 2010 that prohibit any resubdivision of the Payandeh lots. Paragraph 15 of the Apple Manor covenants recorded on September 29, 2010 in Deed Book 1351 at pages 2119-2154 provides that:

“No purchaser or Owner shall be allowed to subdivide or re-subdivide any Lots herein so as to produce a greater number of Lots than currently exist, and this provision is irrevocable and may not be modified or eliminated as otherwise permitted herein, notwithstanding any changes or modifications of Fauquier County regulations which might later permit such subdivision.”

No exception is made for any lot. The exception that had existed in the pre-2010 covenants for the Payandeh property was removed; no resubdivision of the Payandeh property is permitted under the 2010 covenants, which are currently in effect.

The County should not approve waiver applications for subdivisions that are prohibited by private restrictive covenants. In this case, the subdivisions are prohibited by both the pre-2010 and post-2010 Apple Manor covenants. It is in the County’s interest to encourage private restrictive covenants, for road maintenance purposes and otherwise, and the Zoning Ordinance provides that “it is not the intent of this Ordinance to interfere with or abrogate or annul any easements, covenants or other agreements between parties.” FCZO § 1-500. Approval of the Waiver Request would interfere with, abrogate and annul the Apple Manor covenants, and also the road easement under the covenants, discussed below.

The LLCs are not eligible for a waiver

FCZO § 7-302 as written authorizes the Board of Supervisors to modify the direct public street connection requirement only “in conjunction with a request for a special exception permit, site plan approval or subdivision plan approval.” The LLCs have not filed any of these.² Rather, they have filed infrastructure plans, which are not eligible for

¹ The term “subdivide” means “The process of dividing land to establish a subdivision.” FCSO § 2-37. The Payandeh LLC applications do not involve the process of dividing land to “establish a subdivision.” A boundary line adjustment is not a subdivision. Rather, it is “the sale or exchange of parcels between adjoining lot owners.” See FCSO § 3-2(C).

² “Subdivision” is defined in FCSO § 2 and what the LLCs are proposing is not a subdivision. The LLCs are not eligible to file a site plan for the proposed roadway, and special exceptions require a public hearing and right of appeal for aggrieved persons.

a waiver under FCZO § 7-302. That section does not authorize the Board to otherwise modify the ordinance street requirements.³ (Moreover, the LLCs' infrastructure plans are not eligible to be considered under the subdivision ordinance, for the reasons stated in our Petition.)

The Waiver Request implies that, because a waiver of the private-to-private street limitation was approved for the Payandeh lots on May 10, 2007, there is thus no impediment to granting a waiver again. However, when the 2007 waiver was approved, the subdivision had not been declared unlawful by the Virginia Supreme Court. Moreover, the 2007 waiver applied to an entirely different street and one that was not required to meet Type I or II standards. Furthermore, the waiver was subject to the condition that the preferred means of access be at an entirely different location from the proposed street. And, as discussed below, the Virginia Supreme Court had not clarified the application of the Dillon Rule to the waiver authority of localities as it has done in *Sinclair v. New Cingular Wireless*, 283 Va. 198 (2012). Thus, the 2007 waiver creates no precedent for a waiver now.

The waiver requirements are not met

Even if the LLCs were eligible for a waiver under FCZO § 7-302, which they are not, they do not meet the waiver standards, all of which must be met. The standards require the applicant to show that “no other remedy is realistically feasible, that plausible alternatives have been exhausted, that to not so modify the applicable limitation(s) would place an unreasonable restriction on the use of the property and that properties through which access is planned will not be unreasonably affected.” A waiver cannot be approved unless all of the criteria are met.⁴

Properties through which access is planned will be unreasonably affected

The LLC applicants have said that approval of the Waiver Request would “not negatively impact surrounding properties.” To the contrary, the Planning Commission found, when it recommended denial of Payandeh’s waiver proposal in 2006, that “the length of the streets that are proposed to serve these lots is in excess of 10,000 feet; the use of these existing streets to serve an additional eight (8) homes will be of significant impact to property owners who use these streets and would afford inadequate access

³ The Virginia Supreme Court ruled in its July 31, 2015 Order in *Fein v. Payandeh* that “[w]hen a statute or ordinance is unambiguous, courts will interpret it to mean what it says....A legislative body is presumed to choose the words it uses in an enactment with care.”

⁴ The Virginia Supreme Court stated in *Fein v. Payandeh* that each criteria in an ordinance must be given meaning, which is in accord with “the settled rule in this Commonwealth that every provision in or part of a statute shall be given effect if possible.” *Travelers Prop. Cas. Co. of Am. v. Ely*, 276 Va. 339, 345 (2008).

for emergency vehicles and owners of the proposed lots.”⁵ Nothing has changed to make these findings less true.

County staff have advised the applicant LLCs that “construction of the private street to Type I standards as shown has significant impacts to the subject parcels, and does not conform to the rural character of the area. Additional waivers of Subdivision Ordinance street requirements from the Planning Commission would be necessary to make the construction of the private street less impactful.”⁶ However, the LLCs have not requested any additional waivers. Nor would any additional waivers satisfy the requirements of the 1997 subdivision ordinance as incorporated into the Apple Manor covenants. Nor could any such waivers be approved by the Planning Commission, which can waive the ordinance requirements only in connection with a preliminary plat of subdivision⁷ and whose waiver authority in any case has been limited by the Virginia Supreme Court.⁸

The granting of a waiver would be of substantial detriment to adjacent and nearby properties by allowing major cutting and filling on right-of-way easements owned by adjacent and nearby properties, despoiling of the surrounding environment, allowing of clear-cutting and development on mountains within the public viewshed, and permanent loss of hundreds of trees and valuable ecological resources in the Apple Manor Subdivision.

The existing streets in Apple Manor were not designed for the additional traffic that would be generated by the Payandeh lots and, as the Planning Commission found, would afford inadequate access for homeowners and emergency vehicles. In addition, the Apple Manor Subdivision has only one entrance to the public highway – at Leeds Manor Road (Rte. 688) – which was not constructed to VDOT or County requirements.

⁵ Fauquier County Planning Commission, Minutes of June 29, 2006 meeting, A RESOLUTION TO DENY A WAIVER ALLOWING A PRIVATE STREET THAT DOES NOT CONNECT DIRECTLY TO A STATE MAINTAINED ROAD, unanimously approved.

⁶ Staff comment letter of July 25, 2016.

⁷ FCSO § 4-27. The Payandeh LLCs have not filed any preliminary plat of subdivision. Thus, no variance can be granted. Moreover, a variance may be granted only to a “developer.” The term “developer” is defined to mean “An owner of property being subdivided whether or not represented by an agent.” FCSO § 2-7. The Payandeh LLCs are not the owner of “property being subdivided” and thus are not a “developer.” The property is not being subdivided. The term “subdivide” means “The process of dividing land to establish a subdivision.” FCSO § 2-37. The Payandeh LLC applications do not involve the process of dividing land to “establish a subdivision.” A boundary line adjustment is not a subdivision. Rather, it is “the sale or exchange of parcels between adjoining lot owners.” See FCSO § 3-2(C). Thus, no variance can be granted by the Planning Commission.

⁸ See *Sinclair v. New Cingular Wireless*, 283 Va. 198 (2012).

The eight Payandeh lots would generate 80 vehicles trips per day at this entrance, posing potential safety issues for users of the private road and the public road.

In order to access the public street, the additional vehicle trips would need to traverse more than 10,000 feet of existing roads that provide ingress and egress for all Apple Manor lot owners. These roads are nonconforming Type III roads – one-lane gravel roads with slopes in excess of 10 percent. They are all less than 15 feet wide and less than 12 feet wide in most places. Parts of the road have no shoulders and drop off precipitously; it is impossible for two cars to pass. Existing lot owners have horse trailers, utility trailers, tractors, bush hogs, and other farm vehicles that cannot back up or down the narrow, steep parts of the road without difficulty.

**Existing streets would be overburdened and
maintenance costs would increase for existing property owners**

Major upgrading of existing connecting streets and an extension of Apple Manor Road would be necessary to safely accommodate additional traffic generated by the Payandeh lots, requiring major roadwork on rights-of-way owned by other property owners. Increased wear and tear on these roads would impose additional road maintenance costs for existing lot owners. Under the 2010 covenants, which Payandeh adopted using votes obtained by unlawfully resubdividing her lots, the Payandeh lots are exempt from paying maintenance fees for the existing roads.

Construction of any type street to safely access the Payandeh lots would require major disturbance of environmentally sensitive areas and adversely affect neighboring properties. The amount of cutting and filling required to create functional access streets for the lots would require hundreds of trips by dump trucks and heavy construction equipment that would destroy the existing roads in Apple Manor.

County staff testified before Judge Parker in *Fein v. Payandeh* and also have advised the LLC waiver applicants that, when a Type I or II street is required in a subdivision, then the existing private street connections between the proposed Type I or II street and the public street must be upgraded to meet all Type I or II street requirements. Here, the Virginia Supreme Court has said the ordinance requires Type I or II streets. A waiver allowing a private street to connect indirectly to a public street does not mean that the connecting streets are relieved of the Type I or II standards. If the unlawful Payandeh lots are not vacated, Type I or II standards would be necessary to ensure safe ingress and egress for 23 lots that would have legal access to the Apple Manor roads, generating 230 vehicle trips per day.

The LLCs have not proposed any upgrades on the existing private street connections to meet Type I or II standards or indicated who will pay for the required construction and increased maintenance burden. It would be fundamentally unfair to allow the Payandeh LLCs to access the public street using the existing roads without

requiring that they upgrade the streets and pay their share of increased maintenance costs going forward.

Approval would interfere with rights under a private easement

In order to connect two dead-end streets, the Payandeh LLCs must rededicate a vacated easement on Apple Manor Road linking the two streets and substantially alter the easement to conform to the Type I or II standards. As discussed in the Petition, the easement was created by the Apple Manor covenants and by property deeds for the benefit of all Apple Manor lot owners who, by court decree, have the right to use the easement to its full extent in either direction.

The easement was unlawfully vacated by Payandeh in 2010 (using votes obtained from the unlawful subdivision of her lots) and is the subject of pending litigation. The LLCs are proposing to rededicate the easement but only for the exclusive use of the Payandeh lots. The easement cannot be properly rededicated except as part of Apple Manor Road which all of the lot owners are entitled to use. Under Virginia law and Fauquier County regulations, any relocation or alteration of the easement, including the addition of lots or waiver of ordinance requirements or rededication of the easement, requires written consent by the lawful easement owners. See <http://www.fauquiercounty.gov/home/showdocument?id=8311>. No such consent has been given.

The County should not approve a waiver that will negate or interfere with the easement rights of the dominant owners of the easement. The Zoning Ordinance provides that “it is not the intent of this Ordinance to interfere with or abrogate or annul any easements, covenants or other agreements between parties.” FCZO § 1-500.

Any hardship is self-imposed

The Waiver Request states that denial of the waiver would cause a “great deal of hardship to the Applicant.” However, no specific hardship is described and any hardship is the result of the restriction imposed by Mehrmah Payandeh on her own property and her knowing violation of that restriction. As described in the Petition, Payandeh insisted as a condition of her purchase of her lots in Apple Manor that the covenants be amended to allow her to resubdivide the lots subject to the 1997 subdivision ordinance. The LLC applicants have conceded that this covenant provision was a condition to Payandeh’s purchase of her property. The Board of Supervisors has no obligation to relieve the LLCs (which Payandeh created and controlled) of any hardship caused by her violation of covenants that she imposed on her own property.

Denial of the waiver would not unreasonably restrict the use of the property

Denial of the waiver would not affect the use of the property at all. The property still can be used for the purposes permitted under the ordinance and the Apple Manor Covenants—namely, residential, recreational, and agricultural uses, which are the current uses. The property is located in the Rural Conservation district where agriculture is the “preferred use.” FCZO § 3-503. The Planning Commission, in recommending denial of Payandeh’s request for a waiver of the private-to-private street limitation in 2006, found that “denial of this request will not place an unreasonable restriction on the use of the property.”

Moreover, denial of a waiver would not “place” any restriction on the use of the property—it is the Apple Manor covenants that “place” the restriction.

Denial of the waiver would restrict only the LLCs’ ability to subdivide the property, not its use. The waiver thus does not meet the ordinance criterion that “to not so modify the applicable limitation(s) would place an unreasonable restriction on the use of the property.” County staff previously have determined that this standard is not met in the context of a waiver of the requirement that a private street connect directly to a public street:

Staff’s opinion is that this standard cannot be met with this application as to not allow the subdivision would not place an unreasonable restriction on the use of the property. In fact, the denial of this request does not impact the use of the property at all. All it impacts is the ability to subdivide the property.⁹

The staff said “this would be ... the case with all private street limitation waivers that are requested in conjunction with a subdivision application.”¹⁰ As noted above, Judge Parker’s decree requires that the LLCs’ street plans comply with the ordinance requirements applicable to a subdivision application.

The failure to meet this requirement is fatal to the Waiver Request. The Virginia Supreme Court has ruled that “The subdivision agent cannot simply decide that Payandeh need not comply with a requirement imposed by the FCSO. The General Assembly does not even permit a governing body to do so.”¹¹ This rule applies equally to the requirements imposed for waivers under the FCZO. The Board of Supervisors cannot simply decide that a waiver requirement need not be met.

⁹ Department of Community Development Staff Report, Zoning Ordinance Waiver (WAIV-15-003336), July 15, 2015. See also Department of Community Development Staff Report, Zoning Ordinance Waiver (WAVR13-CR-011), Sept. 11, 2014.

¹⁰ Id. (emphasis added)

¹¹ *Fein v. Payandeh*, Virginia Supreme Court Order dated July 31, 2015.

The conservation easement does not support granting a waiver

In considering waiver requests for a private-to-private street, the ordinance provides that:

the Board may consider as an **additional** factor in granting such waiver the development limitations which are imposed on the subject property because the **proposed division** is either (1) a family transfer pursuant to §2-39 of the Fauquier County Subdivision Ordinance, or (2) a **large lot subdivision** pursuant to §2-310 of this Ordinance provided that the parent property is subject to a conservation easement held by a body politic or a political subdivision of the State.

This factor is an “additional” factor that does not obviate the need to meet each of the other factors. Moreover, this factor can support approval of a waiver only when there is a “proposed division” which is not the case here.¹² Moreover, this factor can apply only to a legal large lot subdivision, which excludes the Payandeh unlawful subdivisions.

Moreover, the conservation easement in this case strongly weighs against granting a waiver for the reasons set forth in the Petition. The Virginia Outdoors Foundation granted significant tax benefits to Payandeh in exchange for an easement on her property to preserve it for posterity. The VOF’s easement states that the property:

“contains high elevation open meadows, remnant orchards, and forested slopes, ridges and peaks of Goose Creek Mountain, also known as Brushy Mountain;”

“contains springs and tributaries of Kettle Run and Crooked Run, both streams which flow into Goose Creek;”

“is located within the Goose Creek Watershed, an area planned for special environmental protection in the Fauquier County Comprehensive Plan and in the Critical Environmental Areas Report by the General Assembly of the Commonwealth of Virginia, Goose Creek being a public water supply source and having been designated a State Scenic river;”

¹² The Virginia Supreme Court ruled in its July 31, 2015 Order in *Fein v. Payandeh* that “[w]hen a statute or ordinance is unambiguous, courts will interpret it to mean what it says....A legislative body is presumed to choose the words it uses in an enactment with care.”

“is located on the ‘Scenic Roads, Areas, & Rivers Map’ (map 8.11 in the comprehensive Plan of Fauquier County);”

“areas of the...property are visible from and contribute to the scenic views from State Route 688, a Virginia Byway and a Fauquier County designated scenic road as well as Interstate Route 66, U.S. Route 50, and U.S. Route 17;”

“is within the viewshed of the G. Richard Thompson Wildlife Management Area and the Appalachian National Scenic Trail.”

Notwithstanding these critical conservation values, however, the Virginia Outdoors Foundation has approved the LLCs’ proposal to inflict massive environmental destruction by the construction of a Type I street on the property, which we believe violates the literal language of the VOF easement for reasons discussed in the Petition. The VOF has otherwise demonstrated that it does not intend to strictly enforce the development restrictions in its easement by authorizing clearing and the construction of a house and barn on the widely visible eastern facing slope of Brushy Mountain. Mehrmah Payandeh in 2010 adopted covenant amendments that allow her to place overhead utilities on the property. Denial of the Waiver Request is imperative to protect the valuable environmental and scenic assets enumerated in the conservation easement. The conservation easement weighs against approval.

Compliance with the covenants is a feasible remedy

Compliance by the LLCs with the Apple Manor covenants is a feasible alternative remedy. As noted, the covenants adopted in 2010 prohibit any resubdivision of lots in the Apple Manor Subdivision and no exception is provided for the Payandeh property. After the unlawful subdivisions are vacated in accordance with Judge Parker’s decree, no resubdivision of the Payandeh property will be permitted under the Apple Manor covenants.

The Zoning Ordinance provides that “it is not the intent of this Ordinance to interfere with or abrogate or annul any easements, covenants or other agreements between parties.” FCZO § 1-500. Approval of the Waiver Request would interfere with, abrogate and annul the covenant prohibition against resubdivision of the Payandeh property, contrary to the intent of the ordinance.

Enforcement of the ordinance is a feasible remedy

Another feasible remedy is enforcement of the ordinance. The violations by the Payandeh unlawful subdivisions are criminal offenses. They constitute ongoing misdemeanors subject to fines of up to \$1,000 for each day of violation. FCSO § 12-1;

FCZO § 13-602. The County is entitled to collect substantial penalties for these violations.

Nothing in the subdivision ordinance entitles a property owner to resubdivide lots if they do not meet the ordinance requirements. Virginia Code § 15.2-2254 states that “No person shall subdivide land without...fully complying with the provisions of this article and of the subdivision ordinance” and “No person shall sell or transfer any land of a subdivision, before a plat has been duly approved and recorded as provided herein.” The Payandeh unlawful subdivisions failed to duly comply with the final plat requirements of chapter 10 of the subdivision ordinance, which is a requirement for a large lot subdivision.¹³

Nothing in the Virginia Code or Fauquier County ordinances requires the Board of Supervisors to waive the ordinance for subdivisions that violated the ordinance requirements and have been declared unlawful by the Virginia Supreme Court. The violations should weigh heavily against any waiver.

The road does not qualify as either a Type I or II street

The proposed roadway does not satisfy the requirements for either a Type I or II street. As a Type I street, it fails to meet the non-waivable requirement of FCZO § 7-306 which provides that “In the case of Type I private streets the required right-of-way to an existing state maintained street shall be owned in fee simple by the homeowners association.” Apple Manor has no homeowners association and the private streets are not commonly owned in fee simple or otherwise. As a Type II street, the proposed roadway fails to meet the requirement in FCZO § 7-302 that “no private street shall serve more than seven lots.” The proposed roadway (which utilizes Audubon Trail and Apple Manor Road, including the extension that must be properly rededicated) would serve 23 lots that have the legal right to use Audubon Trail and Apple Manor Road to their full extent in either direction.

The Board of Supervisors lacks waiver authority in this case

The Waiver Request in effect is asking the Board of Supervisors to waive the requirement of the pre-2010 Apple Manor covenants and the 1997 subdivision ordinance that a large lot subdivision meet the street design standards in the zoning ordinance.

¹³ Chapter 10 provides that “The final plat shall not be approved for recordation unless the plat is ... in full compliance with all applicable ordinances and regulations...” § 10-8, and “...The final plat shall not be approved for recordation until the subdivider has complied with the requirements and standards of design in accordance with this Ordinance and other applicable Ordinances...” § 10-8.

Apart from the fact that the Board of Supervisors in 2016 cannot waive private covenants or 1997 ordinances, the Virginia Supreme Court has ruled that a board of supervisors “cannot waive a provision of a subdivision ordinance.” *Board of Supervisors of Culpeper County v. Greengael, LLC*, 271 Va. 266, 626 S.E.2d 357 (2006) (“The Board cannot waive a provision of a subdivision ordinance. Code § 15.2-2254 provides that a developer cannot subdivide land ‘without fully complying with the provisions’ of the subdivision ordinance. See *Parker v. County of Madison*, 244 Va. 39, 42, 418 S.E.2d 855, 856 (1992).”) The Waiver Request in effect asks the Board to waive the subdivision ordinance, something it is not authorized to do.

In *Fein v. Payandeh*, the Virginia Supreme Court ruled that “The subdivision agent cannot simply decide that Payandeh need not comply with a requirement imposed by the FCSO. The General Assembly does not even permit a governing body to do so.” Order of July 31, 2015. The Court added “The General Assembly has permitted subdivision ordinances to provide for variances or special exceptions from the general requirements imposed by the FCSO ‘in cases of unusual situations or when strict adherence to the general regulations would result in substantial injustice or hardship.’ Code § 15.2-2242(1).”

However, the pending Waiver Request does not involve a variance or special exception. In any case, FCSO § 4-27 states that variances or exceptions from the subdivision ordinance must be approved by the Planning Commission.

Thus, the Dillon Rule prevents the Board of Supervisors from approving the Waiver Request to the extent it would constitute a waiver of the subdivision ordinance requirement that the Type I or II street standards be “met.”¹⁴

The Dillon Rule requires denial of the Waiver Request

Because the Virginia Supreme Court has ruled that the Payandeh subdivisions violate the County’s subdivision ordinance and are unlawful, and the LLCs are under an injunction prohibiting them from treating the lots as a lawful subdivision, the Board of Supervisors does not have a proper legal basis to approve the Waiver Request under the Dillon Rule.

As elaborated in the Petition, even though the County was not a party to *Fein v. Payandeh* in the Virginia Supreme Court, the unlawful subdivisions are void ab initio under Supreme Court precedents and ipso facto void under the County’s own

¹⁴ The ordinance says “met” – not waived. The Virginia Supreme Court ruled in its July 31, 2015 Order in *Fein v. Payandeh* that “[w]hen a statute or ordinance is unambiguous, courts will interpret it to mean what it says....A legislative body is presumed to choose the words it uses in an enactment with care.”

ordinances.¹⁵ The County cannot treat the unlawful Payandeh subdivisions as lawful. The Board cannot waive ordinance requirements for lots that were unlawfully approved and recorded and do not lawfully exist.¹⁶ It cannot waive the requirements of private covenants and cannot retroactively waive the requirements of the 1997 subdivision ordinance.

The Waiver Request brings into focus the waiver authority under Fauquier County's zoning ordinance and the question of whether the Waiver Request can even be considered consistent with the Dillon Rule. The Dillon Rule requires an analysis of whether a local governing body is enabled under any State law to take a particular act. If the General Assembly has not authorized a particular act, it is void.¹⁷

The General Assembly has authorized localities to adopt ordinances providing for variances and special exceptions under suitable regulations and safeguards. Code § 15.2-2286.A.3. However, the Waiver Request is not a request for a variance or special exception. Rather, the Waiver Request asks for a "waiver" or "modification" of the zoning ordinance requirements for private streets under FCZO § 7-302.

The General Assembly has authorized localities to adopt ordinances providing for the granting of "modifications" from a zoning ordinance by zoning administrators, subject to certain standards and the provision of notice to adjoining property owners and a right of appeal by aggrieved parties.¹⁸ The General Assembly, however, has not authorized localities to adopt ordinances empowering boards of supervisors to grant modifications of zoning ordinance requirements.

Reviewing Fauquier County's zoning ordinance in light of what the General Assembly has authorized, it is evident that no authority exists under the ordinance by which the Waiver Request can be approved. Although the ordinance purports to authorize the Board of Supervisors to "modify" the street requirements, the General Assembly has said a zoning ordinance may authorize only a zoning administrator to do so. Yet Fauquier County's ordinance does not invest its zoning administrator with such authority.

¹⁵ Longstanding Supreme Court precedents hold that permits issued by County officials without proper authority are null and void. In *Hurt v. Caldwell*, 222 Va. 91 (1981), the Supreme Court ruled that an official "was without authority to issue a building permit...unless and until the County Code provisions had been met. Accordingly, the permit that he did issue was **void** and of no effect...and was, in effect, a **nullity**." In *Segaloff v. City of Newport News*, 209 Va. 259, 163 S.E.2d 135 (1968), the Court ruled, "If a building permit is issued in violation of law...[i]ts issuance by such a municipal officer is **unauthorized and void**."

¹⁶ Judge Parker's decree enjoins the LLCs from treating the lots as a lawful subdivision.

¹⁷ The appendix hereto contains a statement of the Dillon Rule by the Virginia Supreme Court.

¹⁸ Code § 15.2-2286.A.4 (see appendix hereto).

The Waiver Request improperly evades the notice and appeal process

The LLCs' Waiver Request short-circuits the notice and appeal process for adjoining property owners that otherwise would apply under if the zoning administrator were authorized to modify the ordinance requirements. See Code § 15.2-2286.A.4. The Board of Supervisors should not allow this evasion. The Virginia Supreme Court has explained the importance of the notice and appeal procedure:

Decisions to grant or deny a departure from a zoning ordinance necessarily implicate important property rights, not solely for the landowner applying for such a departure but also for other parties who may be adversely affected by a ruling. Accordingly, the decision of the zoning administrator to grant or deny a zoning modification may be appealed to the board of zoning appeals by any aggrieved party. Code § 15.2-2311(A).¹⁹

Moreover, the Waiver Request also appears designed to evade the County's ordinance requirements for a special exception, including the requirement for a public hearing.²⁰

The roadway is designed never to be constructed, contrary to the ordinance

The Waiver Request also circumvents the ordinance requirement that an activity approved by special exception be "established" or that construction be "diligently pursued" within one year. FCZO § 5-014. As discussed in the Petition, however, the LLCs have demonstrated that they have no intention whatsoever of constructing the proposed roadway. Payandeh and her counsel previously told the Board of Supervisors that "no road of any kind will be constructed in the foreseeable future" and "it is entirely unlikely...that a Type I road would ever be constructed."²¹

The Waiver Request states that "construction of said private road requires a waiver" thereby implying that the LLCs intend to construct the private road for which the waiver is requested. However, the LLC applicants have made no commitment that construction will be "diligently pursued" or disavowed their earlier statement that no road will be constructed. The proposed roadway is designed never to be built. The cost of construction is prohibitive and would make the lots unmarketable.

¹⁹ *Sinclair v. New Cingular Wireless*, 283 Va. 198, 720 S.E.2d 543 (2012).

²⁰ FCZO § 5-009 requires a hearing before both the Planning Commission and the Board of Supervisors. FCZO § 5-001(3) provides that "Special exceptions involve issues concerning the neighborhood as well as potential impacts on the general area, the Comprehensive Plan and, in some cases, the County as a whole."

²¹ Statements of Justification dated April 20, 2006 and May 1, 2007 by Mehrmah Payandeh.

It would be improper, and raise a Dillon Rule issue, were the County to exercise waiver authority to approve a street knowing it is intended never to be built. FCZO § 7-304 states that Types I and II streets “shall be constructed” in accordance with approved plans and profiles and a performance bond “will be required to ensure proper and complete construction.”

Approval would be ipso facto void under the zoning ordinance

The zoning ordinance specifically limits the authority of County officials to issue waivers and variances and provides that:

Neither the Zoning Administrator, BZA nor the Board shall have the authority to vary, modify or waive any of the regulations or standards prescribed for any use or purpose for which an administrative, special permit or special exception is required, and any such modification, variance or waiver shall **ipso facto nullify** the action of the BZA or Board in issuing, respectively, any special permit or special exception hereunder.²²

Approval of the Waiver Request would require the Board of Supervisors to ignore the ordinance standards for a special exception, including notice and a right of aggrieved persons to appeal. Approval also would require the Board to ignore the standards in § 7-302, including the standard that “to not so modify the applicable limitation(s) would place an unreasonable restriction on the use of the property” which the staff has said cannot be met. More fundamentally, as discussed above, approval would require the Board to exercise authority it does not have to grant a modification of the ordinance.

Thus, approval of the Waiver Request would be ipso facto void under FCZO § 5-003.1. All in all, the Waiver Request represents an abuse of the County’s ordinances and approval is not authorized under the Dillon Rule.

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Please contact me at melanie@feinlawoffices.com if you need any additional information or have any questions concerning the matters discussed herein.

*Melanie L. Fein*²³

²² Zoning Ordinance Section 5-003.1.

²³ Submitted on behalf of property owners who own seven of the 20 legal lots in Apple Manor Subdivision and other concerned citizens of Fauquier County who have signed a petition opposing any waivers for the Payandeh unlawful subdivisions and urging that the unlawful subdivisions be vacated.

APPENDIX

THE DILLON RULE

The Supreme Court of Virginia articulated the Dillon Rule as follows in *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567 (Va. 2012) (internal citations omitted):

Localities have "no element of sovereignty" and are agencies created by the Commonwealth. Accordingly, when a statute enacted by the General Assembly conflicts with an ordinance enacted by a local governing body, the statute must prevail.

Moreover, local governing bodies "have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." This principle, known as the **Dillon Rule**, is a rule of strict construction: "[i]f there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body."

In considering whether a local governing body had authority to enact an ordinance, there is no presumption that it is valid; if no delegation from the legislature can be found to authorize its enactment, it is **void**. While the "reasonable selection of method" rule may apply to determine whether a local governing body has employed a proper method for exercising a power delegated to it, the rule is irrelevant when considering whether the General Assembly has delegated local governing bodies a power to exercise at all.

VIRGINIA CODE § 15.2-2286.A.4

Where provided by ordinance, the zoning administrator may be authorized to grant a modification from any provision contained in the zoning ordinance with respect to physical requirements on a lot or parcel of land, including but not limited to size, height, location or features of or related to any building, structure, or improvements, if the administrator finds in writing that: (i) the strict application of the ordinance would produce undue hardship; (ii) such hardship is not shared generally by other properties in the same zoning district and the same vicinity; and (iii) the authorization of the modification will not be of substantial detriment to adjacent property and the character of the zoning district will not be changed by the granting of the modification. Prior to the granting of a modification, the zoning administrator shall give, or require the applicant to give, all adjoining property owners

written notice of the request for modification, and an opportunity to respond to the request within 21 days of the date of the notice. The zoning administrator shall make a decision on the application for modification and issue a written decision with a copy provided to the applicant and any adjoining landowner who responded in writing to the notice sent pursuant to this paragraph. The decision of the zoning administrator shall constitute a decision within the purview of § 15.2-2311, and may be appealed to the board of zoning appeals as provided by that section. Decisions of the board of zoning appeals may be appealed to the circuit court as provided by § 15.2-2314.